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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

DURING THE YEAR 1876.

REPORTED BY

CHAS. F. BICKNELL,

CLERK OF SUPREME COURT,

AND

HON. THOMAS P. HAWLEY,

CHIEF JUSTICE.

VOLUME XI.

SAN FRANCISCO:

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Rec. Feb. 4, 1878

JUSTICES OF THE SUPREME COURT.

HON. THOMAS P. HAWLEY CHIEF JUSTICE.
HON. WARNER EARLL }
HON. WILLIAM H. BEATTY } ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

HON. JOHN R. KITTRELL ATTORNEY-GENERAL.
CHAS. F. BICKNELL CLERK.
S. T. SWIFT BAILIFF.

DISTRICT JUDGES OF THE STATE OF NEVADA.
1876.

FIRST DISTRICT	HON. RICHARD RISING.
SECOND DISTRICT.....	HON. S. H. WRIGHT.
THIRD DISTRICT.....	HON. W. M. SEAWELL.
FOURTH DISTRICT.....	HON. W. S. BONNIFIELD.
FIFTH DISTRICT.....	HON. D. C. McKENNEY.
SIXTH DISTRICT.....	HON. F. W. COLE.
SEVENTH DISTRICT.....	HON. HENRY RIVES.
EIGHTH DISTRICT	HON. J. S. JAMESON.
NINTH DISTRICT.....	HON. J. H. FLACK.

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RULES

OF THE

BOARD OF PARDONS.

1. The regular meetings of the board shall be held on the second Monday of January, April, July, and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the State, "approved February 20, 1875."

4. In every case where the applicant has been confined in the State prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon

any of the grounds specified in the original application, except by the consent of all the members of the board.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-General.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon or restoration of citizenship.

RULES
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

RULE I.

Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and a half inches wide at the top, bottom, and side of each page; and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have at least one blank or fly-sheet cover.

Marginal notes of each separate paper, order or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal

is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the clerk a copy of his own for each of the justices of the court, or may, one day before the argument, file the same with the clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the court; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein

provided, and decision upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

RULE XXIV.

I. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

II. The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this State and of the United States;
2. The constitutional relations of the State and Federal governments;
3. The jurisdiction of the various courts of this State and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;
6. The general grounds of equity jurisdiction and principles of equity jurisprudence;
7. Rules and principles of pleadings and evidence;
8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

III. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

IV. When the examination is completed and reduced to writing, the examiners will certify and return it to this Court, accompanied by a certificate showing whether or not the applicant is of good moral character and has attained his majority and is a *bona fide* resident of this State.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

JANUARY TERM, 1876.

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[No. 743.]

**STATE OF NEVADA, RESPONDENT, v. CHARLES HUFF,
APPELLANT.**

INDICTMENT—WHEN DEFECTIVE.—An indictment for murder which fails to show that the death occurred within a year and a day after the perpetration of the act which produced it, fails to state the requisite facts to constitute a complete offense.

IDEM—OBJECTIONS TO FORM WAIVED BY FAILURE TO DEMUR.—*Held*, that the defect, above stated, was waived by the failure of defendant to demur to the indictment.

IDEM—ALLEGATION OF KILLING.—When it is alleged that the defendant, on a certain day and year, etc., “killed” the deceased, it is to be implied that the act which produced the death and the death occurred on the same day.

BILL OF EXCEPTIONS—HOW AUTHENTICATED.—A bill of exceptions must be authenticated by the signature of the judge.

IDEM—SETTLEMENT OF, ON MOTION FOR NEW TRIAL.—The bill of exceptions, or statement, may be settled by the judge after the motion for a new trial is decided. (*By Bentley, J.*)

VERDICT CONTRARY TO EVIDENCE.—A verdict in a criminal case will not be reversed where there is any evidence to support it.

CROSS-EXAMINATION OF DEFENDANT.—When a defendant in a criminal case offers himself as a witness in his own behalf he subjects himself to the same cross-examination that would be proper in the case of any other witness.

IDEM.—Questions may be asked the witness which relate to his conduct and legitimately affect his credit for veracity. The defendant may, however, refuse to answer such questions.

VOL. XI.—2

Argument for Appellant.

IDEM—FREQUENT ASSAULTS AND BATTERIES.—No legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries. It could be inferred that he was a violent-tempered and perhaps a dangerous man, but not that he was a liar.

ERROR—WHEN PREJUDICIAL.—*Held*, that the defendant was prejudiced by being compelled to answer questions addressed to him in relation to his conviction of former assaults and batteries.

APPEAL from the District Court of the First Judicial District, Storey County.

Defendant was indicted for the murder of William Patrick O'Reilly, convicted of murder in the second degree and sentenced to imprisonment in the state prison at hard labor for the term of twenty years.

The facts are stated in the opinion.

De Long & Belknap, for Appellant.

I. The indictment is fatally defective in failing to charge that the death occurred within a year and a day after the wound was given, and in failing to state in *what year* the injury was given or the death occurred. (*People v. Aro*, 6 Cal. 209; *People v. Kelly*, *Id.* 212; *Commonwealth v. Griffin*, 3 Cush. 525; Wharton on Homicide, par. 789; 1 Bishop on Crim. Proc., secs. 237–239, 243–244; 1 Chitty Cr. Law, 222; Compiled Laws, secs. 1859, 1860; 3 Chitty Crim. Law, 736; *State v. Conley*, 39 Maine, 94; *Moor*, 555; *State v. Curtis Orrell*, 1 Dev. Law (N. C.) 139; 2 Hale's Pleas of the Crown, 179.)

II. The court erred in permitting the prosecution to prove the general and specific bad character of the defendant, when the defendant had not put his character either specifically or generally in issue. (1 Bishop on Crim. Proc., sec. 488; *People v. White*, 14 Wend. 111; 3 Greenl. on Ev., sec. 25; 2 Russell on Crimes, sec. 786; 15 N. H. 169; 18 Ohio, 221; 5 Gratt. 696; *Griffin v. The State*, 14 Ohio St. 63; *People v. White*, 14 Wend. 111; *Taylor v. Commonwealth*, 3 Bush (Ky.) 511; *Gale v. The People*, 26 Mich. 158; *People v. Jones*, 31 Cal. 565; *State v. Fair*, 43 Cal. 138; 14 Wend. (above cited); Bishop on Crim. Proc., sec. 490.)

J. R. Kittrell, Attorney-General, for Respondent.

I. The insufficiency of an indictment should be taken advantage of by demurrer, and the question of its insufficiency cannot for the first time be raised in the appellate court. (1 Comp. Laws, sec. 1910; *People v. Josephs*, 7 Cal. 129; *People v. Apple*, Id. 289; *State v. Harrington*, 9 Nev. 94; *State v. O'Flaherty*, 7 Id. 153; *People v. Jim Ti*, 32 Cal. 60; *People v. Farrell*, 31 Id. 576.)

II. The omission in the indictment to specify the year of the commission of the offense is a mere *formal defect* by which no substantial right of the defendant was affected at the date of the trial, nor can now be affected. (*People v. Dick*, 37 Cal. 277; *People v. Murphy*, 39 Cal. 55.)

To test the credibility of defendant, or for purposes of impeachment, it was entirely competent for the district attorney to ask him whether he had been guilty of past crimes and offenses or not. The questions asked of defendant were not propounded with a view to impeach his character, but simply that the answers thereto might affect his credibility. As such they were admissible, and in all respects proper. (1 Greenl., sec. 450; *Newcomb v. Griswold*, 24 N.Y. 298; *People v. Reinhart*, 39 Cal. 449; *Clark v. Inuse*, 35 Cal. 96; *People v. Cronin*, 34 Cal. 205; *Tom Jones's Case*, 2 Wheeler's Crim. Cases, 461.)

By the Court, BEATTY, J.:

The defendant was convicted of murder in the second degree, upon an indictment which (omitting the formal beginning and ending) reads as follows: "Charles Huff, the above-named defendant, is accused by the grand jury of the county of Storey, by this indictment, of the crime of murder, committed as follows: That Charles Huff, the defendant above named, in the county of Storey, state of Nevada, on or about the thirtieth day of June, and prior to the finding of this indictment, without authority of law, unlawfully and with malice aforethought, stabbed with a knife in the hands of him, said defendant, and killed one William Patrick O'Reilley.

No objection was taken to the sufficiency of this indictment in the court below, and the defendant, on his appeal to this court, for the first time makes the point that it is fatally defective on its face because, first, it does not show in what year the offense was committed; and second, it does not show that death ensued within a year and a day after the wound was inflicted.

If the second of these propositions is untenable the first clearly is; for the indictment does show that the offense charged was committed before the finding of the indictment; and as the particular year in which it was committed does not affect the question of jurisdiction, and is not one of the facts necessary to constitute the offense, the objection to the defect was waived by the failure of the defendant to demur. (Compiled Laws, secs. 1910, 1918.)

Section 1863 of the compiled laws shows that the allegation as to the precise time when an offense was committed, is treated as a merely formal allegation except when time is a material ingredient of the offense. This is conceded by counsel, but it is argued that time is a material ingredient of murder, and the language of section 2329 of the compiled laws is relied upon in support of the proposition. "In order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered," etc. The literal import of this language does lend some countenance to the notion that the law is guilty of the absurdity of saying that a malicious killing shall be deemed a harmless or a guilty act according to the length of time the victim survives after receiving the fatal wound. But knowing what the rule of law which the statute recognizes and affirms has always been, we are able to acquit it of such absurdity. It is a rule of evidence merely. Knowing that the real cause of death must be more or less doubtful in all cases where a wound has not proved speedily fatal, the law has wisely set a limit to that inquiry, and has determined that when a wounded party has survived the wound a year and a day, there shall be a conclusive presumption that he died from some other cause. It does not say: "Notwith-

standing you killed him with malice aforethought you are deemed innocent because he lived a year and a day after you stabbed him;" but what it does say is: "He lived so long after you stabbed him, I therefore conclude you did not kill him;" or rather, "It is so doubtful in such cases what was the cause of death, that upon grounds of public policy I have determined never to permit the attempt to show that the wound was the cause."

This is the true meaning of the statute, although its more obvious meaning is something different. But taking this construction, it may still be urged that the time elapsing between the injury inflicted and the death is an ingredient of the crime of murder; for if the ingredients of murder are the killing and the malice prepense, and the time is an ingredient of the killing, it must be an ingredient of the murder. This is true in a certain sense, but our statutes permit the allegation of the killing to be made in one word: the defendant killed; and the allegation of the killing is an allegation of every necessary ingredient of killing. It implies everything that was expressly alleged in the old formal indictments in regard to the infliction of the wound and the resulting death. It is no longer a question in this state, or at least in this court, that the legislature has the power to dispense with those formalities of allegation. As to the meaning of the year and a day rule, see 3 Greenl. Ev., sec. 120 and note; 1 Devereux (N. C.) 139, 141; 3 Coke Inst. 53; 39 Cal. 55; 4 Nev. 274; and see *People v. Cronin*, 34 Cal. 191.

It may be asked, what is the meaning of time being an ingredient of an offense? It means that there are acts which are criminal if done at one time and innocent if done at another. All purely statutory offenses are instances of this, and it is necessary for the indictment to show that they were committed after the passage of the law defining and punishing them.

Finally, it may be said with respect to this particular case, and it would be a sufficient answer to appellant's objection if there was no other, that the indictment does show by fair and reasonable intendment that O'Reilly was stabbed

Opinion of the Court—Beatty, J.

and died on the same day. It says that defendant stabbed him on that day and killed him on that day, therefore he must have died on that day. The evidence, we believe, shows that he did not die until the next day; but this was an unimportant variance; and the question is as to the sufficiency of the allegation, not as to the conformity of the proof.

The next error relied on by appellant is, that the court permitted improper questions to be asked him on cross-examination when he offered himself as a witness, and compelled him to answer them to his prejudice.

It has been a matter of serious doubt with the court whether this point is presented by the record. The judge of the district court has signed a bill of exceptions, which, by reference merely, makes the reporter's notes of the evidence and the rulings of the court during the trial a part of itself, and the clerk has copied into the transcript what purports to be the reporter's notes; but they are not identified or authenticated in any manner, and there is nothing to show that they are the notes referred to by the bill of exceptions. They do not appear even to have been filed in the clerk's office, and for all we know, may have been concocted after the bill of exceptions was signed. Upon consideration, however, we have concluded, as the state has made no objection to the evidence being treated as part of the bill of exceptions, and as it has come to our knowledge that the original record has been destroyed by fire, not to raise this objection ourselves, and we mention the condition of this record merely to direct attention to what we consider a bad practice, if it is a practice, of making other loose documents and papers part of a bill of exceptions by reference. A bill of exceptions is a record, and a very important record. The only mode by which it can be authenticated is the signature of the judge; and when so authenticated, it receives a very high degree of credit. It ought not therefore to be composed of loose and scattered papers, but should be complete in itself, with a formal beginning and ending, so that it may be known where it begins and where it ends when it is copied into a transcript on appeal. Above all, it should

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not be left in a condition that puts in the power of other parties than the judge to alter it completely by the substitution of one loose unauthenticated paper for another.

The condition of this record also suggests the propriety of again directing attention to the provisions of section 424 of the criminal practice act. "The bill of exceptions shall contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken, and the judge shall, upon the settlement of the bill, whether agreed to by the parties or not, strike out evidence and other matters not material to the questions to be raised." This transcript contains one hundred and eighty-three pages of the reporter's notes, of which at least one hundred and seventy-five are utterly superfluous so far as the points presented for review are concerned, which means that the county has been put to a worse than useless expense of probably not less than a hundred and fifty dollars, in order to cumber the transcript with so much rubbish. But the fault of this is not to be imputed to the counsel who prepared the bill of exceptions, or to the district judge who allowed it. It is due rather to a misconception or uncertainty as to the proper practice on motions for new trial, which has arisen in part at least from expressions inadvertently used by this court.

The misconception alluded to is the notion that the same preliminary steps are necessary in moving for a new trial in criminal cases that are prescribed in civil cases, and particularly that it is necessary to prepare and settle a statement or bill of exceptions in advance of the motion in order to authorize the district judge to consider the testimony which is to be relied on in support of it. In *Stanley's Case* (4 Nev. 76), this proposition is "conceded;" but it will be observed that the concession was made merely for the purposes of the argument in that opinion, and that the point was not so decided. It never has been so decided in this state, nor, according to our observation, in California. But the expression above adverted to, and perhaps some others that may be found in the Nevada reports, will always induce counsel in criminal cases to insist upon having the bill of

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exceptions settled preliminary to the motion for new trial, for fear an order sustaining the motion might be reversed upon the ground that it was made without authority. The result is, that whenever one of the grounds of the motion is that the verdict is contrary to the evidence, as it was in this, and is in most cases, every particle of the evidence must go into the bill of exceptions, and must be brought here with the rest of the record, although in nine cases out of ten it is of no possible use for the purposes of the appeal, but on the contrary is a positive drawback.

As long, however, as the misconception referred to is allowed to prevail, we are satisfied it will be useless for this court to repeat its admonitions to district judges to pay stricter attention to the provisions of section four hundred and twenty-four, as above quoted; for if they ought to understand and enforce those provisions without, and even against, the advice of counsel, as their terms imply, certainly this court ought to be able to do as much; and such being the presumption, any intimation of our opinion upon points of practice necessarily related to the construction of that section will have all the force, practically, of a decision. For this reason we desire to call attention to the fact that this court has not decided that a statement or bill of exceptions must be settled before the motion for new trial is made. We think, on the contrary, that a comparison of all the provisions of the practice act as to the time when the motion for new trial must be made, and the time allowed for settling the formal bill of exceptions which is to become a part of the record of the case, will clearly show that the statute contemplates that in all cases the bill of exceptions may, and in many cases it must, be settled after the motion for new trial is decided. (Compare sections 429, 444, 445, 436, 450, 423.)

If it be asked upon what would the judge act if he had no settled bill of exceptions before him, we answer, he acts upon affidavits so far as they are necessary to present the grounds of the motion, and, for the rest, upon his own observation and recollection of the occurrences of the trial, including the exceptions noted. The record of the trial,

according to the old books, is in the breast of the judge during the term, and a motion for a new trial in a criminal case is always made during the term. For the purposes of the motion, therefore, the recollection of the judge is record enough of all that transpired within his observation, and which he can properly state in a bill of exceptions. When the motion has been granted or refused, it is then the proper time to except to the order and to settle a bill of exceptions which will present those points only which are to be reviewed in the appellate court. In fact, the only proper office of a formal bill of exceptions is to get the matter on the record for the purposes of review in the appellate court.

The advantages of following the practice here indicated would, we think, be manifold. In the first place, if counsel were allowed ample time for the preparation of their bill of exceptions, they would satisfy themselves of the inutility of including many things which, when hurried, they put in by way of precaution merely. It is easier and safer to dump in the whole proceedings of the trial, ore and waste together, than it is to assort and arrange in a hurry. In the next place, the argument of the motion for new trial often develops many points of agreement between the prosecution and defense, and either leads to the abandonment of points, or renders it possible to present the law question on the record in the briefest possible terms. But the most important saving would be effected when the ground, or one of the grounds, of the motion was, as in this case, that the verdict is against evidence. When the motion was sustained upon that ground, it is to be presumed the state would seldom except; and when it was overruled, the point would be abandoned on the appeal in all cases where there was no pretense that the evidence for the state, considered by itself, did not make out a *prima facie* case. It has been so often decided in this court, that it ought to be considered settled that we cannot reverse a judgment on the ground that the verdict is contrary to the evidence where there is any evidence to support it. If the defendant should nevertheless insist upon presenting the point here, it would be sufficient to include in the record such testimony as in the opinion of

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the judge tended to convict him, adding the statement that this was all the testimony which in any manner tended to establish the guilt of the defendant. This would present the simple question of law, whether the state had made out a *prima facie* case, and that is all we have jurisdiction to decide.

Returning from this digression to the matter in hand, we find that on the trial of this case, when the state rested, the defendant was sworn and testified in his own behalf. On his cross-examination he was asked: "How many times have you been arrested in Virginia City for unlawfully beating men and women?" His counsel objected to the question, but the court decided that the prosecution had the right to ask it, and defendant excepted to the ruling. The ground of the objection was not stated by counsel, but it clearly appears from the reporter's notes that the ruling of the court was not based upon that omission, but upon the ground that the question was a proper one. The question was then repeated, and the defendant answered: "Three times, I believe."

The examination then proceeded as follows:

Ques. Were you convicted each time?

Ans. Yes, sir. Plead guilty twice and was tried two times.

Ques. What was the name of that woman you were arrested for beating?

Ans. Katie Devine.

Ques. Was that one of the persons that you assaulted and was convicted of the offense?

Ans. I believe it was.

Ques. Do you know a Mr. Robey?

Ans. Who?

Ques. H. L. Robey?

Ans. Yes, sir.

Ques. You were arrested and charged with beating him and cutting off his beard?

Ans. I was.

Ques. And convicted?

Ans. I was.

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Ques. Were you arrested for striking a man with a monkey wrench?

Ans. No.

Ques. You threw it at him though, and was convicted of assault and battery?

Ans. I was.

Ques. Have you ever been in the penitentiary in the state of Ohio?

Ans. No.

Ques. Did you ever kill a man there?

Ans. No.

Ques. Did you ever kill a man in any other state?

Ans. No; etc.

Counsel again objected to all these questions and his objection was again overruled, to which ruling he excepted.

The rulings of the district court in respect to these questions we think were erroneous and prejudicial to the defendant. It is not claimed that the matters in regard to which the defendant was examined could have been given in evidence against him; but it is contended that the questions were proper on cross-examination for the purpose of affecting his credibility as a witness.

It has been decided, and we think correctly decided, in this state (see *Cohn's Case*, 9 Nevada 179), that when a defendant in a criminal case offers himself as a witness in his own behalf he subjects himself to the same cross-examination that would be proper in the case of any other witness. We think, though, that the examination above quoted would have been improper in the case of any witness. The defendant had testified to nothing in chief to which it could be deemed responsive, and the only question is whether as a collateral inquiry it was permissible for the purpose of testing his veracity.

The rule in regard to this sort of cross-examination is, we think, very fairly and correctly stated in 24 New York Reports, 299. "In the latitude of cross-examination, and to enable the jury to understand the character of the witnesses they are called upon to believe, collateral evidence is al-

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lowed from the witness himself, tending to discredit and disgrace the witness under examination. The witness may be privileged from answering; but the question may be put, and, if the witness waive his privilege, answered, if the answer relates to the conduct of the witness and legitimately affects his credit for veracity." We think this rule was violated in this case in allowing an examination in regard to matters not legitimately affecting the veracity of the witness. No legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries. It could be inferred that he was a violent-tempered and perhaps a dangerous man, but not that he was a liar. See 1 Greenl. Ev., sec. 458, to the effect that questions are not permissible, "the answers to which, though they may disgrace the witness in other respects, *yet will not affect the credit* due to his testimony;" the instance given in illustration being the question addressed so frequently to the female witness in the action for seduction, *per quod servitium amisit*, and on indictments for rape, whether she had not previously been criminal with other men, or with some particular person. The case of *Gale v. The People*, (26 Mich. 159) is exactly in point and fully sustains our conclusions. It also meets the point made here that this defendant might have refused to answer the questions. "If these questions were improper it must be apparent that the error was not cured by the instruction to the prisoner that he might decline to answer at his option. When the judge sustained the exceptions he decided in effect that they were proper to be put and answered; and had the prisoner declined to answer any of them, he would have been put in the position before the jury of coming upon the stand in his own exculpation, and then refusing to make his disclosure as full as the rules of law required. An unfavorable influence upon the minds of the jury must inevitably have been produced," etc.

In this case the defendant must necessarily have been prejudiced by a refusal to answer the questions addressed to him after the court decided they were proper, but he was not instructed that he had the privilege of refusing to

Opinion of Hawley, C. J., concurring.

answer, and we cannot doubt that the answers he gave must have excited more or less prejudice against him in his character of defendant in the minds of the jurors who tried him. For this error of the court the judgment must be reversed and a new trial had.

It is so ordered.

EARLL, J., concurring:

I concur in the judgment and in what is said by Mr. Justice BEATTY in respect to the cross-examination of the defendant, and to the mode in which the bill of exceptions should be authenticated.

It is a common law rule that every indictment must allege a day and year certain on which the offense was committed, and I do not think the rule is modified by the statute beyond the form prescribed in section 235 of the act to regulate criminal proceedings; and am of opinion the statute requires a day and year to be stated, though the precise day need not be stated except when time is a material ingredient of the crime. But I concur in the opinion that the defect is waived unless objection thereto be taken by demurrer. I am also of opinion that an indictment for murder which fails to show that the death occurred within a year and a day after the perpetration of the act which produced it, fails to state the requisite facts to constitute a complete offense. But I concur in the opinion that, under the provisions of the statute, when it is alleged that the defendant, on a certain day and year, etc., "killed" the deceased, that it is to be implied that the act which produced the death, and the death, occurred on the same day.

With respect to the question of practice discussed by Mr. Justice BEATTY, I express no opinion, the question not having been raised or discussed by counsel on either side.

HAWLEY, C. J., concurring:

I concur in the judgment of reversal and in the views expressed by Mr. Justice EARLL.

Statement of Facts.

[No. 757.]

THE STATE OF NEVADA, RESPONDENT, v. SAMUEL WATKINS, ALIAS JOHN BERRY, APPELLANT.

BURGLARY—SECTION 2365 OF COMPILED LAWS CONSTRUED—SUFFICIENCY OF INDICTMENT.—The necessary construction of section 2365 of the Compiled Laws defining burglary, is that there is but one species of burglary, the essential definition of which is the entering in the night-time any dwelling-house, tent, etc., with intent to commit petit larceny, or any felony. An indictment showing these facts by proper averments would authorize a conviction of burglary, no matter how the entry was effected.

CORPUS DELICTI—PROOF OF, HOW ESTABLISHED.—Proof that defendant had in his possession, outside of the house, between twelve and one o'clock, goods which were in the house at nine o'clock, and which could only have been obtained by entering the house, was proof of an entry in the night-time, and, taken in connection with the other proof, completely established the *corpus delicti*.

REMARKS OF THE COURT.—It is not trenching upon the province of the jury to say that evidence has been given tending to establish a fact which it clearly does tend to establish.

INSTRUCTIONS.—An instruction that if defendant entered the house and stole therefrom certain goods, it might be inferred that he entered with intent to steal: *Held*, correct.

MODIFICATION OF INSTRUCTIONS.—The court is authorized to modify instructions so as to relieve them of any possible ambiguity, and to make their meaning more certain.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The defendant was convicted of burglary, and sentenced to imprisonment in the state prison for the term of one year.

Pending the trial, the defendant's counsel objected to any evidence being offered as to the goods being found in possession of the defendant, upon the ground that the *corpus delicti* had not been proven. The court, in overruling this motion, said, in the presence of the jury: "I presume the first thing counsel did was to try to prove the entry. The fact that the witness testified that there were some others in the house does not prove conclusively that there was any one else in the room; but the testimony tends to show that the person who took the goods must have entered the room."

Statement of Facts.

The following are the instructions referred to in the opinion of the court:

No. 4. Given by the court: "Should you find beyond a reasonable doubt that the defendant entered the Central Hotel, as alleged in the indictment, in the night-time therein referred to, and also, that at said night-time, after so entering, defendant committed petit larceny by stealing the said woolen blanket and bedspread, or either, then you may infer that defendant so entered with the intention to commit said crime of petit larceny.

No. 1, asked by the prosecution: "If the jury believe from the evidence beyond a reasonable doubt that the Central Hotel is a house situated in the county of Humboldt, state of Nevada, and owned by Hinkey Brothers on the 26th and 27th days of May, 1875; and that on the said days * * * the said Hinkey Brothers were the owners of one woolen sleeping blanket and one coverlet, of the value of eight and three dollars respectively; and that about the hour of one o'clock A.M., of the said 26th day of May, 1875, said property was stolen, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effects of the possession as a circumstance to be considered in connection with other suspicious facts."

No. 1, asked by the defendant: "The defendant is indicted for feloniously, burglariously and forcibly breaking and entering, in the night-time, a house with intent to commit petit larceny. Under this indictment the defendant cannot be convicted of the offense of entering a house without force, the doors or windows being open, with intent to commit any felony or petit larceny." To which the court added: "But if the jury find from the evidence, beyond a reasonable doubt, that defendant, in the night-time referred to in the indictment, entered the room from which the articles therein referred to are alleged to have been stolen, by unlatching or by pressing open the closed door

Argument for Appellant.

of said room, with intent to steal said articles of the Hinkey Brothers, or either of said articles, then this would be a forcible breaking and entry within the meaning of the law, and you should find the defendant guilty as charged in the indictment."

No. 5. "You are not at liberty to infer from the *mere* fact *alone* (if such fact be established by the evidence) that the defendant had the alleged stolen property in his possession, that he committed the burglary charged against him. Although it might be reasonable to deduce from such fact the inferences that a larceny had been committed, it does not follow that such larceny was the result of a burglary." The words "mere" and "alone" were inserted by the judge, and the following added to the instruction: "But you are at liberty to consider the said fact (if such fact be established by the evidence as aforesaid), in connection with all the other evidence in the cause in making up your verdict."

No. 13. "The *mere* possession of stolen goods, in the absence of other proofs, is not sufficient to warrant a conviction for the *larceny*." The word *mere* inserted by the judge. The word "theft" erased and *larceny* inserted, and the following words added: "But the defendant in this case is not on trial for the larceny of the goods referred to in the indictment."

C. S. Varian, for Appellant.

I. The court erred in overruling the objections taken by the defendant to the testimony of the witness Pryor, in which he details the circumstances of the arrest of the defendant and the finding of the so-called stolen property on his person.

It is laid down in the books that there must be clear and unequivocal proof of the *corpus delicti*. (Burrill, Cir. Ev. 734; Starkie on Ev. 758; 1 Wharton, 745; *State v. Davidson*, 30 Vt. 377-385.)

II. Upon the whole evidence the defendant should have been acquitted, as evidence of the *corpus delicti* was too slight. Courts will and do interfere in such cases. (*Tyner v. State*, 5 Humph. 383-4; *Liurton v. Marsh*, 6 Jones N. C. 409; *State v. Davidson*, *supra*.)

Argument for Respondent.

III. The remarks of the court in overruling defendant's objections were entirely uncalled for, and could not have conveyed any but a wrong impression to the jury. From his remarks the jury would and must have naturally supposed that it was necessary to show on the part of defendant conclusively that "some one else" was in that room.

IV. Instruction four, given by the court, does not state the law, as it ignores the question of breaking, actual or constructive. (16 Cal. 431.)

V. Instruction one, given on the part of the state, is flagrantly erroneous.

The possession of stolen property does not tend in any way to prove that the same was obtained by means of a burglary. This instruction fully sustains me in the assertion, that the defendant was tried upon the theory, that he was first to be proven a criminal to the satisfaction of the jury, and then from that fact a burglary as distinguished from a larceny was to be deducted.

VI. The court erred in declining to give instructions one, five and thirteen, offered by defendant, and in adding to them and giving them as modified.

VII. The court erred in refusing instructions four, six and seven, requested by defendant. Their refusal must have resulted in great injury to defendant's case. (Burrill, Cir. Ev. 734; Starkie Ev. 758; 1 Wharton Crim. Law, 745.)

J. R. Kittrell, Attorney-General, for Respondent.

I. The *corpus delicti* was clearly proven in the trial of the case. To be sure its proof was made by evidence circumstantial in its nature, but the body of a crime may be so proven as may be any other fact necessary and essential to be established by proof on a trial. (3 Greenl. Ev. sec. 30, *State v. Williams*, 7 Jones's (N. C. R. 450.)

II. Instruction four, given by the court, correctly states the principle applicable to this case. (*Com. v. Millard*, 1 Mass. 6; C. & H. Notes, 432.)

III. The court below did not err in modifying the instructions asked for by the defendant. (*Com. v. Millard, supra.*)

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By the Court, BEATTY, J.:

The defendant was convicted of burglary, and on appeal from the judgment assigns numerous errors, most of which involve more or less directly the construction of the statute defining that crime. It is defined as follows: "Every person who shall, in the night-time, forcibly break and enter, or without force (the doors or windows being open) enter any dwelling-house, tent, etc., with intent to commit murder, robbery, * * * petit larceny, or any felony, shall be deemed guilty of burglary," etc. (Comp. Laws, sec. 2365.)

The position of the appellant is that there are two distinct crimes designated by the name of burglary; that is to say, to break and enter is one burglary or sort of burglary, and to enter, without breaking, through an open door or window is another burglary; and that a person indicted for breaking and entering cannot, on that indictment, be tried or convicted for entering without force. But we think if the first branch of this proposition were conceded, the second would not follow. On the contrary, it is expressly provided in our criminal practice act that, "In all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or he may be found guilty of an attempt to commit the offense charged." (Comp. Laws, sec. 2037.) By virtue of this provision, a person indicted for murder may be convicted of manslaughter, and it is not a very bold exaggeration to say that we have had almost daily experience of such verdicts in this state without a suggestion ever having been made that they were unauthorized. If, then, a man, indicted for killing with malice, may be convicted of killing without malice, why may not a man, indicted for entering with force, be convicted of entering without force? If there is any principle by which the two cases can be distinguished, it exceeds our capacity to discern it. Upon this consideration alone most of the assignments of error appear to be totally without merit. But we choose to place our decision upon a broader ground.

The necessary, if not the obvious, construction of the

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statute is, that there is but one species of burglary, the essential definition of which is the entering in the night-time any dwelling-house, tent, etc., with intent to commit petit larceny, or any felony. An indictment showing these facts, by proper averments, would authorize a conviction of burglary, whether the proof showed an entry effected by the use of crowbars or giant powder, or by slipping through an open door. Taking the language of the statute, it is clear, in the first place, that the words in parenthesis (the doors or windows being open), are entirely unnecessary to the sense and merely intended to be explanatory; the legislature apparently fearing that it might not otherwise be known that an entry without force is a legal impossibility, unless a door or window is open.

Rejecting these words, then, as mere useless tautology, the statute would read: "Every person who shall in the night-time forcibly break and enter, or without force enter," etc., which is exactly equivalent to saying: "Every person who shall in the night-time enter with or without force;" and as this makes the element of force wholly unessential, it is the same as saying: "Every person who shall in the night-time enter." The truth is, the element of force had been so refined away by judicial construction, long before the enactment of the statute, that there was no sense in retaining it as a constituent of the crime. It had been decided that the lifting of a latch, the lowering of a window-sash or the gently pressing open of an unfastened door, was a forcible breaking. It stood a mere shadow of a former substance in the law, serving only as the basis of subtle refinements and technical distinctions between acts that did not essentially differ in point of criminality. The intention of the legislature undoubtedly was simply to eliminate it from the definition of the offense. Why they should have resorted to such an awkward paraphrase of the simple language that would have expressed their intention without any ambiguity, is one of those things that are past finding out. It cannot be denied that our construction of the law does convict the legislature of extreme infelicity of expression, but to construe it as appellant does is to convict them of downright

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folly. For what would be the result? On an indictment for entering with force, proof of an entry without force would have to be excluded, and *a fortiori* on an indictment for entering without force, proof of entering with force would have to be excluded. Whence it would follow that in any case where it was reasonably doubtful on the proof, whether the entry was effected with or without force, the defendant could never be convicted upon any sort of indictment, although it might be established by the most indubitable proof that he did enter, and notwithstanding he is, in the eye of the law, equally guilty, and subject to the same penalty in either case. This result is a little too absurd to be attributed to the intention of any legislative body. It may be observed, in conclusion, that the whole section of the statute under consideration, seems to have been drawn with a reckless extravagance of words, and no argument can be founded on its roundabout mode of expression. Why, for instance, should it say, "with intent to commit murder, robbery, rape, mayhem, grand larceny, petit larceny, or any felony," instead of saying, "with intent to commit petit larceny, or any felony," which means exactly the same thing?

The indictment in this case is for breaking and entering. Whether the proof sustains the allegation of force or not, it is, in view of the foregoing construction of the statute, unnecessary to decide, and we do not so decide, although we think it does. It is at all events not disputed that it sustains the allegations of entering in the night-time with intent to commit larceny. This being premised, we will examine the defendant's exceptions *serialim*.

On the trial of the case, the prosecution, after proving that certain articles, consisting of wearing apparel and bed-clothes, which were in a room of a lodging-house in Winemucca at nine o'clock at night, were missing in the morning, and that it was impossible for any one to have taken them without entering the room where they were, offered to prove by a policeman of the town that he had arrested the defendant between twelve and one o'clock the same night with these articles in his possession and under most suspi-

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cious circumstances. The defendant objected to the testimony upon the ground that the *corpus delicti* had not been established, and it was not competent to introduce evidence tending to connect him with the commission of a crime which had never been committed. The objection was overruled, and properly so we think. It is a sufficient answer to the objection to say that the very evidence objected to tended to establish one ingredient of the *corpus delicti*. It was necessary to show that the entry was effected in the night-time, and proof that defendant had in his possession, outside of the house, between twelve and one o'clock, goods which were in the house at nine o'clock, and which could only have been obtained by entering the house, was proof of an entry in the night-time, and, taken in connection with the other proof, completely established the *corpus delicti*. It was then, of course, proper to show the suspicious circumstances connected with defendant's possession, for that tended to prove him guilty of the larceny; and as the larceny could only have been committed by means of a burglarious entry, it necessarily tended to convict him of the burglary.

The remarks of the court in overruling the objection were not uncalled for. They explained, in perfectly appropriate language, the grounds of his ruling, and this, if not necessary, was at least not improper. If courts contented themselves in ruling upon objections by saying simply, "I overrule your objection," or "I sustain the objection," it would often be impossible to conjecture the ground of the ruling, and it would lead to unnecessary repetitions of objections covered by the grounds of the first ruling. In order to save the court and counsel from thus acting at cross-purposes it is well for the court to explain its rulings, care being taken, in so doing, not to trench upon the province of the jury. It is not trenching upon the province of the jury to say that evidence has been given tending to establish a fact which it clearly does tend to establish, and this was, in effect, all that the judge said.

Instruction No. 4 given by the court is not erroneous on the defendant's own theory of the law. It does not instruct the jury that the defendant is guilty if he entered and stole,

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but that if he entered and stole it may be inferred that he entered with intent to steal, which as a substantive proposition is undoubtedly correct, and was proper to be given in the case.

Instruction No. 1, given at request of the state, laid down the law correctly, and there is no question that it was applicable. It did not instruct the jury that the defendant was guilty of burglary if he stole the goods, but that if he stole the goods that tended to prove that he committed the burglary, which it unquestionably did considered in connection with the evidence that they could not have been stolen without a burglarious entry of the house where they were.

The modification of instruction No. 1, asked by defendant was proper. The court was asked to instruct the jury that the defendant could not be convicted unless he entered by force. The court appended a definition of force which was correct and pertinent. The fault of the instruction as given is that it was too favorable to the defendant in sustaining his construction of the statute.

Of the modifications of instructions 5 and 13 asked by defendant, it may be said that their only effect was to relieve the instructions of any possible ambiguity, and to make their meaning more certain. It was proper, too, in connection with instruction 13 asked by defendant, to remind the jury that he was not on trial for larceny, otherwise they might have inferred from its language that they could convict of larceny, a verdict which the indictment would not have supported.

Instructions 4, 6 and 7, asked by defendant, and refused, were all erroneous because based upon his construction of the statute; and even if they had not been erroneous the court would perhaps have been justified in refusing them for the reason that their substance had been given in other instructions.

Having reviewed all the points urged by the appellant and discovered no error on the part of the court below, its judgment is affirmed.

Points decided.

[No. 762.]

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM McCLEAR, APPELLANT.

SECTION 3, ARTICLE I, OF THE CONSTITUTION CONSTRUED.—The provisions of the Constitution that, "The right of trial by jury shall be secured to all, and remain inviolate forever," refers to the right of trial by jury as it existed at the time of the adoption of the Constitution.

COMMON LAW JURY—POWER OF THE LEGISLATURE.—It is competent for the legislature to point out the mode of impaneling juries, and the forms of the common law in procuring a jury can be changed and made subject to statutory regulations.

JURY LAW OF 1875.—*Held*, unconstitutional.

IDEM—MEANING OF WORDS "TRIAL BY JURY."—The terms "jury" and "trial by jury," as used in the Constitution, mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled and sworn to render a true verdict according to the law and the evidence.

IDEM—REASON AND POLICY OF THE LAW.—The reason, expediency and policy of the law is determined by its passage in the legislature and approval by the governor. These questions furnish no ground for declaring the law invalid.

IDEM—RIGHT TO CHALLENGE A JUROR FOR ACTUAL BIAS.—It is not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias.

IDEM—RIGHT TO CHALLENGE A JUROR FOR IMPLIED BIAS.—The right to challenge for implied bias may, to some extent, be regulated by the legislature, care being always taken to preserve inviolate the right of trial by a jury of twelve impartial men.

IDEM—PEREMPTORY CHALLENGES.—There is a broad distinction between challenges for bias and peremptory challenges. The former challenges exist as matter of right. The latter is by favor of the legislature only. The number of peremptory challenges has always been regulated by statute.

IDEM—OBJECT OF CHALLENGES.—The great purpose of the right to challenge a juror for actual or implied bias is to secure to the defendant and the state a fair and impartial jury.

IDEM—EFFECT OF DECLARING THE LAW VOID.—*Held*, that the effect of declaring certain parts of the amended law of 1875 unconstitutional and void, is to leave in full force the sections of the law of 1861 which the act of 1875 attempted to amend and repeal.

IDEM—COMPETENCY OF A JUROR.—The question as to what expression of opinion or belief as to the guilt or innocence of the defendant will disqualify a juror discussed. *Held*, that the sum and substance of this whole question is, that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales and a true verdict render according to law and evidence.

11	39
11	106
11	107
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12	123
12	304
12	305
14	450
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Argument for Appellant.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The facts are stated in the opinion.

Rand & Van Fleet, for Appellant.

I. The act of the legislature of the state of Nevada concerning juries in criminal cases, approved March 2, 1875, is unconstitutional and void. It conflicts with section 3 of article I of the Constitution of the state of Nevada. It conflicts with section 8 of article I of the Constitution of the state of Nevada. It is in derogation of common law and against reason and justice. It deprives a party charged with a capital or infamous crime of the right of trial by an impartial jury. (Secs. 3 and 7 Chitty's Black., book 3, 362 to 365; 13 N. Y. Court of Appeals, 425-427; 7 Nev. 157; 2 Parker's Crim. Rep. 402; 41 N. H. 551; 11 Cal. 175; 43 Cal. 331; 1 Bishop's Crim. Pr., secs. 908, 909; 1 Bouvier's Law Dictionary, sec. 771; 1 Bishop's Crim. Pr., secs. 897-900, 910, 911, 912; 43 N. J. 33; 7 Cow. 108.)

II. The defendant's right to a peremptory challenge is a special privilege, and he is not compelled to exercise that privilege upon a juror who is disqualified by law. (16 N. Y. Court of Appeals, 505; 40 Cal. 248.)

III. Due process of law, as understood by the framers of the Constitution, means a substantial right as distinguished from a mere matter of form. Due process of law at the time of the adoption of our Constitution, according to popular acceptance and its legal significance by a long course of adjudications, meant the right of a person charged with a felony to a trial by an impartial jury, drawn from the body of the people, within the jurisdiction of the court trying the cause. That when so selected the jurors should be composed of such material as would constitute a good common law jury; a jury according to the general acceptance of the term at the time of the adoption of the Constitution; a jury according to the law of the land, as generally understood and accepted at the time. (1 Kent's Com. 624; note, page 626; 4 Hill, 140; 13 N. Y. Court of Appeals, 392-3, 416-17; 55 Ill. 280; 8 Gray, 342-50; 48 N. H. 57.)

Argument for Respondent.

IV. The legislature may prescribe the mode of obtaining a jury, but it cannot, under the pretext of regulating the manner of obtaining and impaneling a jury, deprive a party of a substantial right guaranteed by the Constitution. (7 Cal. 16; 3 Nev. 341; 53 N. Y. 164; *Eason v. State of Tennessee*.)

J. R. Kittrell, Attorney-General, for Respondent.

I. The "right of trial by jury" simply means that one accused of a violation of the criminal enactments of this state shall have the privilege of being tried for the offense imputed to him by a jury of twelve men, selected according to the requirements of law, and who possess those qualifications which the law of the state provides they shall possess, in order to be legally constituted jurors to try a criminal case.

While I am prepared to admit that by the terms of the state constitution all the essential and material elements of a trial by jury, as they were established and existed at common law, were guaranteed to the citizens of this state, I am not willing to concede that the framers of our fundamental law intended to strip the legislature of the right to adopt forms and to make all needful rules and regulations whereby that ancient and peculiar form of trial might be extended to a citizen charged with an infraction or violation of any part of the criminal code.

I claim that the statute of 1875, now in question, merely points out the mode of securing the trial by jury—this and nothing more; and this being its sole object, and only aim and purpose, it is not only constitutional, but clearly within the power of the legislature to enact it. (*Dowling v. State of Mississippi*, 5 S. & M. 681; *Jones v. State*, 1 Ga. 610-619; *Waller v. People*, 32 N. Y. 147; *Warren v. Com.*, 37 Penn. 45; *Hartzell v. Com.*, 40 Penn. 462.)

II. The law, as amended, is in no sense repugnant to the Constitution, because it does not deprive a defendant charged with the grade of crime therein specified of his right of trial by jury; on the contrary, the very object of its enactment was to point out the *modus operandi* by which that right should be secured to him.

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Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial. (32 N. Y. 159.)

III. A trial by jury is understood to mean, *ex vi termini*, a trial by a jury of twelve men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. (2 Story on Const., sec. 1779.)

IV. Every legal presumption is in favor of the constitutionality of an act of the legislature. (*Respublica v. Duquet*, 2 Yeates, 493; *Com. v. Smith*, 4 Binn. 123; *Bank v. Smith*, 3 S. & R. 68; *Eakin v. Raub*, 12 S. & R. 340; *Com. v. Zephon*, 8 W. & S. 382; *Sharpless v. Mayor, etc., of Philadelphia*, 9 Harris, 147.)

By the Court, HAWLEY, C. J.:

The defendant was indicted, tried and convicted of the crime of rape.

Upon the trial, when the court ordered the clerk to draw from the box containing the list of trial jurors thirty-six persons, the defendant, by his counsel, excepted to the order upon the ground that the act of the legislature of this state entitled, "An act to amend an act entitled 'An act to regulate proceedings in criminal cases in the courts of justice in the territory of Nevada,' approved November twenty-sixth, eighteen hundred and sixty-one" (approved March 2, 1875), under which said jury was so ordered to be drawn, is unconstitutional and void, for the reason that said act deprives a party accused of crime of the right of trial by a fair and impartial jury. That under the provisions of said act, a person accused of crime may be deprived of his life or liberty without due process of law, in this, that said act does not allow a defendant charged with a felony to challenge a juror for actual bias; nor does it allow such defendant to challenge a juror for having formed or expressed an unqualified opinion as to defendant's guilt. Thirty-six names were then drawn from the box, and being examined as to their actual state of feeling towards the defendant, and all matters from which a bias against the defendant might be inferred, as by

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said act allowed, fourteen of the thirty-six jurors upon their *voir dire* stated that they knew, or had heard the facts in the case, and had formed and expressed an unqualified opinion that defendant was guilty of the crime charged. Ten out of the fourteen said they were biased and prejudiced against the defendant. Four of this number said they could not give defendant a fair and impartial trial, and one of them stated as a reason for his bias and prejudice, in addition to his opinion upon the facts, that he had had a personal difficulty with defendant.

To each of the fourteen jurors the defendant interposed a challenge for implied bias, for having formed and expressed an unqualified opinion of the guilt of the defendant; and also, for actual bias for entertaining such a state of mind toward the defendant as would prevent said juror from giving defendant a fair and impartial trial. Each and every challenge so interposed was overruled by the court, and the ruling excepted to by defendant. The state and the defendant then, in pursuance of the provisions of said act, each challenged peremptorily one juror alternately until each had taken twelve peremptory challenges. Thereupon the court ordered the clerk to swear the remaining jurors to try the cause, to which order defendant excepted and assigned the same reasons as were stated in his objections at the commencement of the trial, and the further reason that there were two among the jurors that were ordered to be sworn to try this cause, who had expressed themselves as being actually biased against the defendant, and had formed and expressed an unqualified opinion that defendant was guilty, and that the defendant had been denied the right to challenge off said jurors from the panel. These objections were overruled, defendant excepting.

The validity of the act is the only question presented for our decision upon this appeal. It will be observed that the act changes the law of 1861 in two important particulars. First. It leaves out any ground of challenge: "For the existence of a state of mind on the part of the juror in reference to the case which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he

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will not act with entire impartiality, and which is known in this act as actual bias." (Stat. 1861, p. 470, sec. 339.) Second. It leaves out as one of the grounds for implied bias: "Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." (Id., sec. 340.) It then provides that if the offense be punishable with death or imprisonment for life in the state prison, that from a list of thirty-six jurors otherwise possessing the statutory qualifications, the state and the defendant shall challenge peremptorily one juror alternately till each has taken twelve peremptory challenges, and the remaining twelve jurors shall be sworn to try the case. If the defendant shall refuse to take his peremptory challenges the court shall take it for him." (Stat. of 1875, p. 117.)

It is argued by defendant's counsel, first, that the act conflicts with section 3 of Art. 1 of the Constitution; second, that it conflicts with section eight of Art. 1 of the Constitution; third, that it is in derogation of common law, and against reason and justice.

Section 3 of Art. 1 of the Constitution of this state provides that: "The right of trial by jury shall be secured to all, and remain inviolate forever."

This provision has reference to the right of trial by jury as it existed at the time of the adoption of the Constitution, and we are called upon to determine what were the constituent elements of a jury as understood at that time. It has been frequently decided in many of the older states that the trial by jury contemplated by the constitution is a trial by a common law jury.

The only authorities produced by the state, in favor of the constitutionality of the act in question, go to the extent that it is competent for the legislature to point out the mode of impaneling juries, and that the forms of the common law in procuring a jury can be changed and made subject to statutory regulations.

In commenting upon this question the court in *Dowling v. The State of Mississippi*, say: "Thus while the constitution must be construed to have adopted the generous privilege of the common law trial by jury in its essential ele-

ments, it reasonably follows that whatever was an accidental and not an absolute part of that institution, the mere superfluous forms and complicated proceedings of the English courts, is not necessarily included to have been guaranteed in the right by the clause of the constitution. It was therefore competent for legislation to point out the mode of impaneling juries, both grand and petit, so long as it did not intermeddle with the *constituents* of those bodies." (5 *Smedes Marshall*, 682.)

This general principle is well settled by the authorities. In addition to those cited by the Attorney-General in his brief, we refer to the following: *The People v. Fisher*, 2 Parker's Cr. R. 406; *Perry v. The State*, 9 Wis. 21; *Stokes v. The People*, 53 N. Y. 164; *Colt v. Eves*, 12 Conn. 251.

The same doctrine was announced by this court in *The State v. O'Flaherty*. Justice Garber, in delivering the opinion, said: "The power of the legislature to mould and fashion the *form* of an indictment is plenary. Its *substance*, however, cannot be dispensed with. Upon the same principle, it is held that a statute which destroys or materially impairs the right of trial by jury, as it existed according to the course of the common law, is repugnant to the constitutional guarantee of that right." (7 Nev. 157; see also *State v. Cohn*, 9 Nev. 189.)

This brings us to the controlling question in this case. Are the omitted portions of the law of 1861 essential constituents of a jury as known at common law? This opens up a wide and extensive field of inquiry and necessarily involves a patient examination of many authorities. It was claimed upon the oral argument that the constitutional provision only requires a jury of twelve men. That the number is all that is essential. We must confess that this appears to have been the view entertained by the legislature in the passage of the amended act. If this be true, it would be within the power of the legislature to take away all the other qualifications without violating any of the provisions of the Constitution, and the right of trial by jury—so long esteemed as the palladium of our liberties—if such power was exercised, would soon dwindle into insignificance and

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become a byword and reproach upon our entire 'judicial system. If such an opinion was ever seriously entertained, it seems to us that a moment's thought ought to have dispelled the illusion. Surely the provision meant twelve sane men. An insane man, an idiot, or a lunatic, would count in number the same as a sane man. An alien would be equal to a citizen; yet at common law such persons were never allowed to sit as jurors, but were challenged *propter defectum*. A man who had taken money for his verdict, or had eaten or drank at the expense of either party, would count in number equal with others who were not guilty of such misconduct; at common law such persons were always excluded from the jury when challenged *propter affectum*. Again, a man who had been convicted of a felony would count equal with the citizen who had never been accused of any crime; but at common law such a man could always be challenged *propter delictum*. Many other comparisons might be made; but these are deemed sufficient. To our minds the conclusion is self-evident that something more than the number twelve ever was, and is, essential to the formation of a jury. We think that the term "jury," as it is used in the Constitution, means twelve competent men who are free from all the ties of consanguinity and all other relations that would tend to make them dependent on either party. It means twelve men who are not interested in the event of the suit, and who have no such bias or prejudice in favor of, or against, either party as would render them partial toward either party. These, among others, are the general definitions which we consider are guaranteed by the Constitution. Some of these qualifications are recognized by the statute as essential, and need no illustration or argument to establish the necessity of preserving them. Others are left out, and with them we have to deal.

Under the amended act, the inestimable privilege of being tried by a jury is susceptible of the following illustrations: A person is indicted and brought to trial for the crime of murder. The names of thirty-six men are drawn from the jury-box, who possess the statutory qualifications. These men are then "examined as to their actual state of

feeling toward the defendant, and as to all matters from which a bias against the state or the defendant may be inferred," and it is found that twenty-four out of the thirty-six were actually present at the preliminary examination of the defendant before the committing magistrate; had heard all the evidence and had made up their minds, formed and expressed the opinion and still entertain it, that he was guilty and ought to be hung. They further state, under oath, that they are so biased and prejudiced against him that they cannot impartially try the case. The other twelve are shown to be impartial, and in every respect are fully competent to act as jurors. This examination being concluded, "the state and the defendant shall challenge peremptorily one juror alternately, till each has taken twelve peremptory challenges, and the remaining twelve jurors shall be sworn to try the case." Now, all that the district attorney would have to do in order to secure a conviction, would be to challenge off the twelve men who were impartial. The defendant could only challenge twelve out of the other twenty-four, and this would leave twelve men to "be sworn to try the case" who had declared that defendant was guilty, still believed him guilty, and who were so prejudiced against him that they could not give him a fair and impartial trial. Still the sacred number, twelve, remains inviolate, and this, we are told, is all the law considers essential to constitute a jury. The defendant protests against the injustice of such a trial, and demands that he be allowed to challenge such jurors for cause. This right is denied him. The trial proceeds. The same evidence is offered that was produced at the preliminary examination. The case is submitted, and the defendant is, of course, convicted. Whereupon the prisoner, when he comes up before the court for sentence, is informed of the great privilege that has been guaranteed to him, of the right of trial by a jury of twelve men. However gratifying the result of such a trial might be to the prosecution, it is doubtful if the defendant could fully appreciate the blessings, about which so much is said in the books, of the inestimable privilege of being tried by a jury. On such a trial, the presumption of innocence, as required

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by other provisions of the statute, is overthrown. The defendant, being compelled to go to trial before a jury that had declared his guilt, would have to produce evidence in order to establish his innocence. Let us reverse the rule, and apply it against the state. Suppose that when the thirty-six names are drawn from the box, twenty-four answer that they are well acquainted with the defendant, and have heard all the facts pertaining to the case, and have arrived at the deliberate conclusion, have formed and expressed the opinion and still entertain it, that the defendant is innocent. The defendant challenges the twelve competent jurors. The prosecution can only challenge twelve, and this leaves a jury of twelve men who have already prejudged the case in favor of the defendant. What rights would the state have on such a trial? None whatever. Would the general interests of the public be protected? Certainly not. And yet we have, in the eye of this law, the right of trial by jury preserved inviolate. Would it be necessary, in such a case, to go through with the farce (for farce it certainly would be) of a trial? We apprehend not. The result in this case would be quite satisfactory to the defendant, but the prosecution and the people at large would have grave doubts of the utility of the protection afforded by the Constitution. We have adopted these extremes for the purpose of illustration only. Either of the events were liable to happen. Even in the present case, fourteen out of the thirty-six had prejudged the case against the defendant. The number, however, has nothing to do with the principle that is involved in this decision, and that is, whether the defendant or the state can, by any act of the legislature, be deprived of the right to challenge such jurors for cause, either for implied or for actual bias?

The illustrations we have made tend to show the injustice that might exist in individual cases under the practical workings of the law. Our purpose, however, is beyond the determination of this question. We must deal with the act as we find it, and determine, from all the lights that can be ascertained, whether or not it violates any of the provisions contained in the Constitution; and if it does not,

the act may stand; but if it does, it must fall. The reason, expediency and policy of the law has been determined in its favor by the co-ordinate departments of our state government; and however much we may doubt their judgment, we here accept it as final, and consider that the act deserves, as it has received, the careful attention and deliberation of this court.

After the most thorough examination we have been able to make, we are of the opinion that it is not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias. This right cannot in any manner be abridged. The right to challenge for implied bias for having formed or expressed an opinion upon the guilt or innocence of defendant may, to some extent, be regulated by the legislature, care being always taken to preserve inviolate the right of trial by a jury of twelve impartial men. This right to challenge for the principal cause, or to the favor, exists independent and irrespective of the right to exercise peremptory challenges as usually allowed by statutory enactments. We are, therefore, irresistibly led to the conclusion that the act in question is in both of these respects clearly in violation of the provisions of the Constitution. To prove the correctness of these conclusions, we propose, at some length, to review the authorities.

Sir Edward Coke, in vol. 1 of his Institutes of the Law of England, in discussing the question of the right of trial by jury, under the head of *propter affectum*, says: "And this is of two sorts; either working a principal challenge, or to the favor. And, again, a principal challenge is of two sorts; either by judgment of law without any act of his, or by judgment of law upon his own act." After treating these questions at considerable length, he adds: "Now the causes of favor are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our books concerning that matter. *For all which the rule of law is that he must stand indifferent as he stands unsworn.*" (1 Coke, 157, b.)

The result of our investigation authorizes us to state in

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the outset that the language in italics was ever at the common law recognized as an essential qualification of a juror.

At the trial of Peter Cook, in the Old Bailey, in 1696, for high treason, these proceedings took place:

"Cook. My lord, before the jury is called, I am advised, that if any of the jury have said already that I am guilty, or they will find me guilty, or I shall suffer, or be hanged, or the like, they are not fit or proper men to be of the jury.

"L. C. J. Treby. You say right, Sir; it is a good cause of challenge." (13 State Trials, 333.)

In Bacon's Abridgment we find that: "Jurors ought to be *omni exceptione majores*, and by the words of the writ such *per quos rei veritas melius sciri poterit, et qui nec the plaintiff, nec the defendant, aliqua affinitate attingunt*. Which words contain all causes of objection from partiality or incapacity, consanguinity and affinity; therefore, if the juror be under the power of either party, as if counsel, servant of the robes or tenant, he is expressly within the intent of the writ. So, *if he has declared his opinion* touching the matter, or has been chosen arbitrator by one side, * * or has done any act by which it appears that *he cannot be impartial*; as if he has eaten or drunk at the expense of either party, or taken money to give his verdict; these are principal causes of challenge. But, though a juror is not under the distress of either side, or has not given apparent marks of partiality, yet there may be sufficient reason to suspect he may be more favorable to one side than the other. And this is a challenge to the favor. * * And in these inducements to suspicion of favor, the question is, whether the jurymen are indifferent as he stands unsworn? For a jurymen ought to be perfectly impartial to either side; for otherwise his affection will give weight to the evidence of one party, and an honest but weak man may be so much biased as to think he goes by the evidence, when his affections add weight to the evidence. Now, since the writ expects those by whom the truth may best be known, it excludes all those who are apparently partial without any trial, because they are not under the qualifications in the writ, since the truth cannot be known to them. But where the partiality is not apparent,

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but only suspicious, then the juror is to be tried, whether favorable or not, that is, whether he comes within the description of the writ; and if the triers think he does, then he is to be set aside." (5 Bacon's Ab. 353.)

To the same effect is Blackstone, the most eminent of English authors on the common law: "Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal challenge* or *to the favor*. A principal challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor. * * All these are principal causes of challenge; which if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges to the favor, are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of triers, whose office it is to decide whether the juror be favorable or unfavorable. * * Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit, and renders him infamous." (2 Chitty's Blackstone, 280.)

From these quotations it will be observed how scrupulously delicate and how impartially just this law approves itself in the constitution and frame of a tribunal, thus contrived for the test and investigation of truth, especially in its caution against all partiality and bias, "by quashing the whole panel or array if the officer returning is suspected to be other than indifferent; and repelling particular jurors if probable cause be shown of malice or favor to either party."

Thus stood the law in England at the time of the revolution, where it was justly esteemed as the great bulwark and safeguard of civil rights and political freedom. When our ancestors removed to this country they brought this system with them and claimed it as their birthright and inheritance, and the guarantee of a right of trial by jury has since been inserted, not only in the federal, but, as we believe, in every state constitution.

Before referring to the American cases it may be well to state that no case can be found in the books having any

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direct reference to a statute like the one under consideration, for the simple reason that no other state in the Union has ever attempted by legislation, in criminal cases, to deprive a citizen accused of crime of the right to challenge a juror at the trial, for actual bias, or *to the favor*, and but one (Tennessee) to impair the right to challenge for implied bias, or *principal cause*, upon the ground of the juror having formed or expressed an unqualified opinion of the guilt of the defendant. But nevertheless many cases have been found that are applicable, and, as we think, decisive of the questions under consideration.

Before commenting upon these authorities it is also proper to state that the provisions of the constitutions of the states of Ohio, Indiana, Illinois, Wisconsin and Tennessee, are the same as in the constitution of this state. Massachusetts and New Hampshire guarantee the "right of trial by jury." New York, Georgia and Pennsylvania, "a trial by jury, in all cases in which it has been heretofore used, shall remain inviolate." In Connecticut and Louisiana the words "impartial jury" appear. The provision, "in all cases in which it has been heretofore used," means that in cases that were not triable by a jury before the adoption of the constitution the parties would not be entitled to the right of trial by a jury after its adoption, and this general principle has been applied to every state constitution.

The proper and well-settled construction of the constitutional provision which declares that the right of trial by jury shall remain inviolate, is, that the right of trial by jury shall remain inviolate, as it existed at the formation of the constitution. Cases which before the constitution were not triable, need not be made so now. Parties cannot now be deprived of trial by jury who were entitled to demand it at and before the formation of the constitution. And, on the other hand, cases not having the right at that time to demand a jury, cannot now demand a jury as of right, because of the constitutional provision. (Cooley's Constitutional Limitations, 410, note 2, and authorities there cited; Sedgwick on Statutory and Constitutional Law, 547.) The decisions found in the states that guarantee the right of trial by

an impartial jury, are alike applicable to this case. It was decided in the *State v. Wilson*, Butler, C. J., delivering the opinion, that the constitutional provision for an impartial jury "is in affirmance of the common law." (38 Conn. 137.)

The distinction between challenges for principal cause and challenges to the favor, so often spoken of in the books, is well understood. The former is for what in judgment of law will disqualify a juror, and is known as implied bias. The latter is anything else which operates to render him partial, and is known as actual bias. There is also a broad and clear distinction between these causes of challenge and the right to interpose a peremptory challenge as is usually allowed by statutory enactments. The former challenges exist at law as matter of right. The latter is by favor of the legislature only. The number of peremptory challenges has always been regulated by statute. It is a personal privilege given to the defendant and the state to select a jury from jurors who are in all respects competent and impartial, and it enables the defendant and the state to make personal preferences in the selection of the jury. This is a question of policy and humanity which may always be decided by the legislature.

With these explanations we proceed to the examination of the American cases.

In *The People v. Vermilyea et al.*, the question of the extent of the right, guaranteed by the constitution of the state of New York, of trial by jury, was thoroughly discussed by learned counsel and ably decided by the court. At the trial, a juror (Mr. Norwood) was challenged for the principal cause. He testified that he had heard all the evidence given on the former trial, having been present at it; that he had made up his opinion perfectly on the evidence that the defendants were all guilty and had frequently expressed his opinion to that effect. In reply to questions asked by the district attorney, he stated that he felt no bias or partiality against any of the defendants; that if the testimony given on the trial should appear as it did on the former trials, he should certainly find the defendants all guilty; and added, that he thought he felt compelled to give a verdict according to his oath, and the evidence as it should appear.

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The real questions submitted to the supreme court for decision were, whether a man who had formed and expressed an opinion that defendants were guilty was, in judgment of law, an impartial juror; and whether the challenge should have been, as it was, for principal cause, or to the favor. In the argument of the case it was admitted that every citizen, whether arraigned for crime or impleaded in a civil action, is entitled to a trial by a fair and impartial jury. The court say: "The trial by jury is justly considered an invaluable privilege; but it would become a mockery if persons who had prejudged the case were admitted as impartial triers. All the elementary writers, with the exception of Chitty, lay down the proposition broadly, that if a juror has declared his opinion beforehand it is a good cause of challenge." (7 Cow. 108.) After reviewing the authorities, Woodworth, J., in delivering the opinion says: "Upon the reason of the thing, the authority of adjudged cases, and the general understanding of the bench and bar, I have no doubt that the law is not chargeable with such injustice as to warrant the admission of a juror who, from a knowledge of the facts, or information derived from those who knew the facts, shall have formed or expressed an opinion." In the course of the opinion the judge says it will not be pretended that any members of the grand jury who found the indictment, or any of the jurors who sat on the former trial, would be admissible, and that he could not discriminate between those jurors and the juror Norwood, who had formed as decided an opinion on the merits of the case as any of them. "Can it be for a moment supposed, that a man who had formed such an opinion as Norwood had could stand indifferent or impartial?" It was decided that "the statutory provision authorizing the challenge of a grand juror, who shall be called on the petit jury to try the same indictment, is clearly in affirmance of the common law; and proves that when a man has formed an opinion, even upon an *ex parte* hearing, it is a valid exception to him; *a fortiori*, the objection is conclusive if the juror has formed an opinion upon hearing the whole case. * * * the wisdom of the law has always require

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the trial without prejudice or partiality as respects either party." It was also decided that the law presumes that the expression of an opinion on the merits of a case indicates bias, or that the mind of the juror is decidedly unfavorable to the defendant, and that such expression of opinion is a principal cause of challenge.

In the case of *The People v. Allen* it was decided by the Court of Appeals that "it is the right of a prisoner to be tried by an impartial jury, and the juror must be indifferent both as to the person and the cause to be tried." (43 N.Y. 33.)

Upon the common law rule the court, in the case of *The Commonwealth v. Hussey*, granted a new trial; it appearing that two of the jurors on the trial had been of the grand jury which found the indictment; the court observing, "that if these jurors attended to their duty when upon the grand jury, they could not have been impartial on the trial." (13 Mass. 221.)

In *Perry v. The State*, *supra*, it was contended that an act of the legislature providing the mode of selecting jurors was unconstitutional. Counsel for the defendant argued that as the drawing of jurors by lot became a part of the law of England before the revolution, that it was therefore a part of the law of this country at that time, and was universally practiced. The court correctly held that the manner of designating the persons who were to act as jurors at any term of court was clearly within the control of the legislature, and that the constitutional right to a jury trial was not impaired merely because the statute required that the jurors had been selected instead of drawn; and in deciding this question the court say: "We think that in order to preserve the right of trial by jury, it is not necessary to preserve any particular mode of designating jurors, even though such mode may have been in force at the time of the adoption of the constitutional provision. All that the right includes is a fair and impartial jury, not the particular mode of designating it."

In *Gibbs v. The State* the court say: "The Constitution secures to the accused, in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of

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the county or district in which the crime shall have been committed." (3 Heiskell, 76.)

To the same effect are the decisions in our own state. "That all persons held on a criminal charge," say the court in *Ex parte Stanley*, "have the legal right to demand a speedy and impartial trial by jury, there can at this time be no doubt. The right was guaranteed to the English people by the great charter; it has been confirmed in subsequent bills of right, iterated and reiterated by the courts, and defended and protected by the representatives of the people with jealous care and resolute courage. In this country the same right is generally guaranteed by the constitutions of the respective states, or secured by appropriate legislative enactments." (4 Nev. 116.)

But returning to the decisions directly upon the point whether a defendant in a criminal action has the constitutional right to challenge a juror for cause, for having formed or expressed an opinion of defendant's guilt, or to challenge a juror for actual bias, for entertaining a prejudice against the defendant.

In *Fleming v. The State*, the defendant had been tried and convicted of the crime of arson. At the trial, his counsel challenged a juror for cause, and in support of the challenge asked him whether he was not one of the Milford committee at the time that Fleming was arrested, "and did you not counsel and direct that he should be kept in custody without a warrant, for some ten days; and was there not an agreement between the members of that committee, to indemnify each other against any prosecution that Fleming might institute against them for said imprisonment; and do you not consider his conviction in this case as necessary to you and your associates' protection from such prosecution?" The lower court considered the question irrelevant, and refused to allow it to be answered. On appeal, the supreme court say: "We think the court erred in refusing to allow the juror to answer. If the facts assumed in the question existed, they established such a relation between the juror and the defendant as was scarcely compatible with that impartiality which should characterize a juror. * * * That

a juror has formed an opinion is one ground of challenge; that his relations or feelings toward the objecting party are such that he would not be likely to form an impartial one in the jury-box, is another. The following may be deduced from the authorities as grounds of challenge for cause. There may, perhaps, be additional ones:

1. That the juror is interested in the pending, or a similar suit.
2. That he does not possess the statutory qualifications.
3. That he is of kin to one of the parties.
4. Personal hostility.
5. A pending lawsuit between the juror and the party.
6. That the juror is master or servant, landlord or tenant, of the opposite party, or has eaten or drank at his expense since being summoned as a juror, or has promised to find a verdict for him.
7. That he has formed or expressed an opinion in the cause, is a witness in it, or has been a juror on a former trial of it." (11 Ind. 235.)

How far the ground of challenge for having formed or expressed an opinion in the cause, can be regulated by the legislature without impairing the constitutional right of a trial by a jury of twelve impartial men, may be inferred from what is said by the court of appeals in *Stokes v. The People, supra*. It was there claimed by counsel for the defendant, that the jury law of New York was unconstitutional. The law provides that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in regard thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror, who may have formed or expressed or has such an opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously

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formed opinion or impression will not bias or influence his verdict; and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. The court held the law to be constitutional. In the opinion delivered by Grover, J., it is distinctly announced that "any act of the legislature providing for the trial otherwise than by a common law jury composed of twelve men, would be unconstitutional and void; and any act requiring or authorizing such trial by a jury partial and biased against either party, would be a violation of one of the essential elements of the jury referred to in and secured by the constitution." After quoting the provisions of the statute, the court say: "It will be seen that the intention of the act was not to place partial jurors upon the panel, but that great care was taken to prevent that result. The end sought by the common law was to secure a panel that would impartially hear the evidence, and render a verdict thereon uninfluenced by any extraneous considerations whatever. If the person proposed as a juror can and will do this, the entire purpose is accomplished. To secure this, the statute requires that he shall make oath that he can do this, irrespective of any previous or existing opinion or impression. Not that this may be safely relied upon, on account of the difficulty of determining, by a person having an opinion or impression, how far he may be unconsciously influenced thereby, the statute goes further, and provides that the court shall be satisfied that the person proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. Surely this latter provision, if rightly and intelligently administered by a competent court, will afford protection to the accused from injury from a partial jury. But the accused has not only this, but the further protection in his right, after challenge for principal cause has been overruled, again to challenge for favor, and have this tried and determined, uninfluenced by the decision made by the former challenge. While the constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common

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or statutory, principally the latter; and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, *taking care to preserve the right of trial by an impartial jury.*"

From what is subsequently said in this opinion, we are led to believe that in the case of *Eason v. The State* a decision had been rendered upon the provisions of the Tennessee statute upon the same subject, to the effect that the juror should be competent if he stated on oath that upon the law and testimony on trial he believed he could give the accused a fair and impartial verdict. This statement was made conclusive of the question, and that the statute had been declared unconstitutional. We are not in possession of the reports containing this opinion, but, from what is said in *Stokes's Case*, felt authorized to allude, in the former part of this opinion, to the State of Tennessee as having, in this respect, attempted by legislation to impair the right of trial by jury as known at common law.

In 1860, the supreme judges in New Hampshire were called upon to answer these questions:

1. Has the legislature the power so to change the law in relation to juries, as to provide that petit juries may be composed of a less number than twelve?
2. Has the legislature power to provide that a number of the petit jury, less than the whole number, may render a verdict?

The questions were both answered in the negative.

In delivering the opinion, the court say: "We have considered these questions as of great importance and interest, since the trial by jury has been steadily regarded, from the earliest judicial history in England, as the great safeguard of the lives, liberty, and property of the subject against the abuses of arbitrary power, as well as against undue excitements of popular feeling. In our own country, almost from its earliest settlement, the trial by jury was claimed by the people as the birthright of Englishmen, and as the most valuable of the rights of freemen; and in the great struggle which secured our national independence, no right of the colonists was more urgently and strenuously insisted upon.

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We have, therefore, examined these questions with anxious care, and we are without any disagreement among ourselves as to the conclusions we have formed, and which we now proceed to state in answer to those inquiries. We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the Constitution and the laws were adopted.

The terms "jury" and "trial by jury," are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.

A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them.

All the books of the law describe a trial jury substantially as we have stated it; and a "trial by jury" is a trial by such a body so constituted and conducted. So far as our knowledge extends, these expressions were used, at the adoption of the constitution, and always before, in these senses alone, by all classes of writers and speakers. (41 N. H. 550.)

The whole current and drift of the authorities in the United States are, without exception, to the same effect.

In addition to those quoted, we refer to the following:

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Work v. The State, 2 Ohio State, 297; *People v. Bodine*, 1 Denio, 304; *Freeman v. The People*, 4 Denio, 34; *Wynehamer v. The People*, 13 N. Y. 424; *Cancemi v. The People*, 16 N. Y. 504; *People v. Williams*, 6 Cal. 207; *Cooley v. The State*, 38 Tex. 637; *Ingersoll v. Wilson*, 2 West Va. 59, Burrill's Law Dictionary, title Challenge; Wharton's Law Dictionary, title Challenge; U. S. Crim. Law (Lewis), 611; Cooley's Constitutional Limitations, 319; 1 Bishop Cr. Procedure, 764, 768, 773, 774, 779, 781; *Flint River Steamboat Company v. Foster*, 5 Ga. 195; *Staup v. The Commonwealth*, 74 Penn. State, 458.

All the decisions we have quoted from were delivered without a single dissenting opinion. During our researches we have been unable to find a single case in America holding a contrary doctrine. No such case has been called to our attention by counsel, and we are convinced that none can be found.

We have so far been considering the questions submitted to us with reference to the rights of the defendant only. But there is another side to this subject well worthy of our consideration. The state has certain rights as well as a prisoner. The people need protection as well as the defendant who is accused of crime. The right of trial by jury as guaranteed by the constitution is as much for the protection of the whole people as for the individual prisoner.

In Louisiana it is provided by statute that the method of trial, and all proceedings in the prosecution of crimes *changing what ought to be changed*, shall be according to the common law unless otherwise ordered.

In *The State v. Bush*, the only point presented by the bill of exceptions was the action of the court below in sustaining a challenge for cause made by the state to a juror, who did not understand the English language, but only German. It was argued by the prisoner's counsel that the juror was a qualified and registered voter, and as such a qualified juror; there being a statute of the state to that effect. The court, in deciding this question, say: "A challenge for cause may exclude many jurors otherwise embraced in the general terms of the law. Thus a qualified elector may be chal-

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lenged *propter affectum*, by reason of some supposed relationship, bias or partiality, or previous formation and expression of opinion. A qualified elector may be challenged *propter defectum*, as if he be an idiot or lunatic. * * * This right to challenge for cause does not spring from any especial provision of law, but from the general rule that the method of trial shall be according to the common law. * * * Now a person who only understands German, and does not understand English, is no more capable of sitting as a juror * * * where the proceedings are conducted entirely in English, than if he were deaf and dumb. The accused might desire him, it is true; for such a juror would always be bound to acquit, inasmuch as he could never be satisfied beyond a reasonable doubt of the guilt of the accused; but this very desire, if founded on such a reason, is one that cannot properly be gratified. The state has some rights in a criminal court, and among them is certainly the right to have a jury composed of men who understand the language in which are conducted those proceedings by which, against the presumption of innocence, she seeks to establish a conviction of guilt." (23 La. Ann. 15.)

In *The Commonwealth v. Leshner*, the defendant was tried for murder, and when Isaac W. Morris was called as a juror, he declared that he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, although the evidence should require such a verdict. The attorney for the commonwealth challenged the juror for cause and the challenge was allowed. Defendant having been convicted of manslaughter, appealed to the supreme court for a new trial and assigned this ruling of the court as error. The court say: "It seems to be admitted that the rules of the common law must govern our decision. Equally undisputed it appears to be, that in every criminal trial, without exception, there is precisely the same right of challenging a juror for cause given to the commonwealth or to the prosecutor, which is given to the defendant. The law guards against all the approaches of error and falsehood as much

on one side as on the other; and in challenges for cause, no distinction is admitted between bias and predetermination of a juror against a defendant, and bias and predetermination in favor of a defendant. The law, in every case, is scrupulous to prevent even the possibility of undue bias. It does not deal with a juror as with a witness: admit him though it doubts him. The slightest ground of prejudice is sufficient. The prejudice itself need not be made out; the probability of it is enough. One related, though by marriage only, * * * to the defendant or the prosecutor, may be challenged off the jury for that cause. Any one, who in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is excluded. Nothing in the law can well be more extensive than this right of challenge *propter affectum*." (17 Sergt. and Rawle, 156.)

Another case directly in point is found in Illinois. On the trial of the defendant for murder a juror stated on his *voir dire* that he had no conscientious scruples against finding a man guilty of an offense punishable with death, where the proof was positive, but no degree of circumstantial evidence would induce him to render such a verdict; that before he would find a verdict of guilty he should require the positive testimony of a witness who saw the crime committed. Another juror stated that he should be very reluctant to render a verdict of guilty, even if his judgment was convinced of the prisoner's guilt; he did not know but that he might be starved to render such a verdict, but thought he should hang the jury and thus defeat a verdict of guilty. The prosecution challenged both jurors for cause; the challenges were allowed, and this ruling was assigned as error on appeal. This was a case upon which the state relied entirely upon circumstantial evidence to establish the guilt of the defendant. Treat, C. J., in delivering the opinion of the court, said: "A juror ought to stand indifferent between the prosecution and the accused. He should be in a condition to find a verdict in accordance with the law and the evidence. * * * It would be but a mockery to go through

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the forms of a trial with such a person upon the jury. The prisoner would not be convicted, however conclusive the proof of his guilt. Neither of these jurors was competent to try the case. Their minds were not in a condition to decide the issue according to the law and the evidence." (*Gates v. The People*, 14 Ill. 435.)

Numerous authorities might be cited to the same effect, but we deem it unnecessary to enter into any elaboration upon this branch of the case, and have only referred to it for the purpose of showing that the principles of the common law, which it is conceded must govern and control our decision, apply as well for the protection of the state as for the prisoner; a proposition which, at this late day, we apprehend will not be questioned.

Another feature of the right of trial by jury as guaranteed by the Constitution is deserving, in this connection, of a brief notice. This provision applies to civil as well as criminal cases. Now, while this is true, we do not think it will be questioned but what it was primarily intended to protect inviolate the trial by jury in criminal cases; nor will it be denied that courts should ever watch with more jealousy any departure from, or infringement upon, trial by jury in criminal cases, where the life or liberty of a citizen is at stake, than in the trial of civil cases, where the rights of property are alone involved.

In the *Chicago & Alton R. R. Co. v. Adler*, which was an action brought by Adler, as plaintiff, against the railroad company, defendant, to recover a penalty for the failure to ring a bell or sound a whistle at the crossing of a highway with its engine and trains, four of the jurors on their *voir dire* stated that if the evidence was evenly balanced they would lean against the defendant. Now, it will be observed that in this case no other prejudice existed against the defendant. It does not appear that either of the jurors had heard the facts of the case, or had formed or expressed any opinion whatever upon the merits. But if the testimony was evenly balanced they did declare that they should find a verdict in favor of the plaintiff. Justice Walker, who delivered the opinion of the court, in deciding the question of the competency of the four jurors, who, after their expres-

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sion of opinion, were permitted, against the defendant's objection, to act as jurors, said: "It is a fundamental principle, that every litigant has the right to be tried by an impartial and disinterested tribunal. Bias or prejudice has always been regarded as rendering jurymen incompetent. And when a juror avows that one litigant should have any other than the advantage which the law and the evidence give him, he declares his incompetency to decide the case. He thereby proclaims that he is so far partial as to be unable to do justice between litigants, or that he is so far uninformed, and his sense of right is so blunt, that he cannot perceive justice, or, perceiving it, is unwilling to be governed by it. The rule is so plain and manifest that the party claiming to recover must prove his cause of action, it is a matter of surprise that an adult can be found who would not know that such is the common sense as well as the common honesty of the rule. No ordinary business man would be willing that a claim pressed against him should be allowed, and he be compelled to pay it, when the evidence for and against the claim was evenly balanced. * * Nor does the fact that jurors, who avow, under oath, that they would incline to favor a recovery by the plaintiff on evidence evenly balanced, declare that they are impartial, in the slightest degree tend to prove their impartiality. Their statement only tends to prove that they are so far lost to a sense of justice, that they regard what all right-thinking men know to be wrong, as just and impartial. To try a cause by such a jury is to authorize men who state that they will lean, in their finding, against one of the parties, unjustly to determine the rights of others, and it would be no difficult task to predict, even before the evidence was heard, the verdict that would be rendered. Nor can it be said that instructions from the court would correct the bias of jurors who swear that they incline in favor of one of the litigants. In suits for the recovery of penalties, the law does not warrant a recovery, unless the proof clearly preponderates in favor of the plaintiff. And to admit jurymen, who avow that they will not even require a preponderance, would be to violate the rule." (56 Ill. 346.)

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The necessity of strictly observing the policy of the common law requiring twelve impartial and competent jurors to try civil actions was learnedly discussed by Garber, J., in the case of *Sacramento and Meredith Mining Co. v. Showers* (6 Nev. 291).

From this review of the authorities it will be seen that the great purpose of the right to challenge a juror for principal cause, and to the favor, is to secure the defendant and the state a fair and impartial jury. It will also be noticed that in many of the cases we have cited, questions arose that were not covered by any of the illustrations referred to by writers on the common law, or found in the statutes regulating this subject. Whenever this condition of affairs existed the courts have universally applied the general principles of the common law, and any prejudice, state of feeling, or condition of mind, that would make the juror partial to one side or the other, has always been considered a good ground of challenge. In these cases it has been said to be one of the excellencies of the common law, that it admits of perpetual improvement by accommodating itself to the circumstances of every age, and applies to all changes in the modes and habits of society; that it will never be outgrown by any refinements, and never out of fashion while the ideality of human nature exists. It is a law which deals in things more than in names, and under its wise and beneficent rules no contrivance or means of any kind whatever will ever be made effectual to select a jury for the purpose of destroying the innocent or screening the guilty.

Now, it does not follow from anything we have said, or from any of the opinions we have quoted, that the mere fact that the juror has formed or expressed an opinion upon the guilt or innocence of the defendant necessarily renders him an incompetent juror. As matter of fact, it is well known that in this enlightened age, where railroads, post-offices and the telegraph open up every avenue of communication, and where every man reads, or ought to read, the newspapers containing the current news and events of the day, a man may have formed and expressed an opinion that defendant is guilty or innocent from what he has read in the

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daily papers, or heard from idle rumor on the street, or partial statements gleaned from casual conversations with witnesses or other persons, may nevertheless be a competent juror, and might, upon a full hearing of the case from the testimony delivered under oath in a court of justice, be fully prepared to render an impartial verdict according to the law and the evidence.

As the effect of our decision will be to leave in full force the sections of the law of 1861, which the act under consideration attempted to amend and repeal, and as it is there provided that a juror may be challenged for implied bias for having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged, it is unnecessary to decide what expression of opinion would actually disqualify a juror. In fact, much must always be left to individual cases as they arise. The decisions of courts upon this point are by no means uniform. There is a great diversity of opinion among the various judges in the different states, some holding that a juror's mind must be like a blank sheet of paper, having no knowledge or opinion whatever in regard to the guilt or innocence of the defendant. We do not concur in such extreme views, nor do we find that the law demands any such rule. All laws are said to be founded in reason, and we must take a common sense view of these questions whenever they are properly presented. We think the New York statute goes as far in regulating this subject as the limits of the constitution permit, and it is well here to state that in the decision in *Stokes's Case*, declaring that law constitutional, two of the judges expressed no opinion. When not regulated by statutory provisions we think that whenever the opinion of the juror has been formed upon hearing the evidence at a former trial, or at the preliminary examination before a committing magistrate, or from any cause has been so deliberately entertained that it has become a fixed and settled belief of the prisoner's guilt or innocence, it would be wrong to receive him. In either event, in deciding these questions, courts should ever remember that the infirmities of human nature are such that opinions once deliberately

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formed and expressed cannot easily be erased, and that prejudices openly avowed cannot readily be eradicated from the mind. Hence, whenever it appears to the satisfaction of the court that the bias of the juror, actual or implied, is so strong that it cannot easily be shaken off, neither the prisoner nor the state ought to be subjected to the chance of conviction or acquittal it necessarily begets. But whenever the court is satisfied that the opinions of the juror were founded on newspaper reports and casual conversations which the juror feels conscious he can readily dismiss, and where he has no deliberate and fixed opinion, or personal prejudice or bias, in favor of or against the defendant, he ought not to be excluded. The sum and substance of this whole question is, that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales and a true verdict render according to the law and the evidence.

We acknowledge the justice and force of the argument made by the attorney-general, that when there is any doubt upon the constitutionality of a law it ought to be sustained. This rule has been frequently announced and steadily adhered to by this court. But no lawyer, in our judgment, after an examination of the authorities, can have any doubt whatever as to the unconstitutionality of the act under consideration. However unpleasant it may be to declare an act of the legislature void, our duty is plain. The man may feel, but the judge must act. Upon a review of the facts and law of this case, our deliberate conviction is that the defendant has been deprived of the right of trial by a jury of twelve competent and impartial men as guaranteed to every citizen by the provisions of the constitution.

The judgment of the district court is reversed and the cause remanded for a new trial.

By BEATTY, J., concurring:

I concur in the judgment and in the opinion to this extent. I am satisfied that the right of trial by jury secured by the constitution embraces the right to an impartial jury; and that this law, depriving the defendant of the right to

Argument for Appellant.

challenge for actual bias, is for that reason unconstitutional; and as its various provisions are so inseparably dependent that none can stand alone, except sections 8 and 9, which embrace different subjects, it must be wholly set aside except as to those sections, leaving the old law in force in all other particulars. Upon the other points discussed I express no opinion.

[No. 694.]

WILLIAM EVANS, RESPONDENT, v. JOSEPH COOK,
ET AL., APPELLANTS.

JUDGMENT, ENTRY OF.—Where a defendant is severally liable a separate judgment against him may be entered upon his default, leaving the action to proceed against his co-defendants.

JUDGMENT BY DEFAULT—EXCUSABLE NEGLIGENCE.—Cook signed the undertaking upon which he is sued, upon the representation of Hanley that the sole consideration of the note declared upon in the attachment suit was a gambling debt, that he (H.) could and would defend the action on that ground; that H., instead of defending the action, and by collusion with the plaintiff for the purpose of cheating and defrauding C., suffered a judgment to be taken against him; that H. frequently represented to C. that the matter was settled and that he need not trouble himself about it, etc.; that he was actually induced by these representations, made by procurement of the plaintiff, to neglect to file his answer in time. *Held*, that this was excusable neglect.

DEFENSE TO A PROMISSORY NOTE.—It is a good defense to an action on a promissory note to show that the consideration for which it was given was money won by gambling.

ADOPTION OF ENGLISH STATUTES.—English statutes in force at the date of the declaration of American independence and applicable to our situation are a part of the common law which we have adopted (affirming *Ex parte Blanchard*, 9 Nev. 105).

"GAMING" AND "GAMBLING."—These words are defined and treated as synonymous.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

J. C. Foster, for Appellant.

I. The power of the court to set aside defaults should be liberally exercised, so that cases may be disposed of upon their merits; mere technicalities should be avoided when

Argument for Respondent.

they affect substantial rights. In this case, fraud and collusion are relied upon and fully set forth in the affidavit and answer. When such is the defense, the court should open the default and permit the defendant to set up his defense. (*Rowland v. Kreyenhagen*, 18 Cal. 455; *Howe v. Independence Co.*, 29 Cal. 72; *McKinley v. Tuttle*, 34 Cal. 235; *Howe v. Coldren*, 4 Nev. 173; 5 Nev. 386.)

II. The summons having been served on all the defendants, and a default against Hanley, no judgment can be entered against one alone. (*Mayenbaum v. Murphy*, 5 Nev. 386; *Bullion M. Co. v. Cræsus Co.*, 3 Nev. 337; *Keller v. Blasdel*, 1 Nev. 493; *Keller v. Blasdel*, 2 Nev. 163; 1 Chit. Pl. 44; *Stearns v. Aguire*, 7 Cal. 447; *Stearns v. Aguire*, 6 Cal. 176; *Lewis v. Clarkin*, 18 Cal. 402; *Cloffin v. Butterly*, 5 Duer, 327; *Brunskill v. James*, 1 Kern. 294; *Slayter v. Smith*, 2 Bos. 624.)

III. All the states in the Union (with the exception of California) have held gaming contracts illegal, contrary to the principles of morality and against sound policy. (*Perkins v. Eaton*, 3 N. H. 155; *Hoit v. Hodge*, 6 N. H. 104; *Clark v. Gibson*, 12 N. H. 387; *Wheeler v. Spencer*, 15 Conn. 30; *Laval v. Meyers*, 1 Bail. S. C. 486; *Lewis v. Littlefield*, 3 Shep. 233; *Edgall v. McLaughlin*, 6 Whar. 176; *Wilkinson v. Tousley*, 16 Minn. 299.)

A. B. Hunt, for Respondent.

I. It was not an abuse of discretion to refuse to open the default upon the showing made. (*Woodward v. Backus*, 20 Cal. 137; *Harper v. Mallory*, 4 Nev. 449; *Bailey v. Tuaffe*, 29 Cal. 424.)

II. Respondent had the right to hold either one, any or all of the defendants, for the amount mentioned in the undertaking, as each one had made himself severally liable for the whole; and a judgment may be given against one or more of several defendants.

III. There is no statute in this state forbidding wagers; and, by an act of the legislature, the common law has become a part of the jurisprudence of this state. (Comp. Laws, sec. 1.)

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IV. Wagers are recoverable at common law when not opposed to public policy, and when they do not injuriously affect the interests of third parties. (*Johnson v. Fall*, 6 Cal. 359; *Johnson v. Russell*, 37 Cal. 640; *Jonas Ball v. Gilbert*, 12 Met. 397; *Clark v. Gibson*, 12 N. H. 386; *Campbell v. Richardson*, 10 John. 406; *Bunn v. Riker*, 4 John. 426; *Morgan v. Pettit*, 3 Scam. 529; *Haskell v. Wootan*, 1 N. & McC. 180; *Dennison v. Strother*, 1 Tex. 89; *Kirkwood v. Brown*, 8 Tex. 10; *Campbell v. Reeves*, 14 Tex. 8; *Carson v. Rambert*, 2 Bay. S. C. 560; *Scott v. Duffy*, 2 Har. 18; *Wast v. McIntyre*, Wright, 356; *Wheeler v. Friend*, 22 Tex. 683; *Trenton L. and F. Ins. Co. v. Johnson*, 4 Zab. 576-584; *Mulford v. Bowen*, 4 Hal. 315; *Dewes v. Miller*, 5 Har. 347; *Smith v. Smith*, 21 Ill. 244.)

V. The high and exalted morality assumed by the supreme court of Minnesota, we think is fully and completely answered in the case of *Yates v. Foot*, 12 John. 1.

By the Court, BEATTY, J.:

The complaint in this action shows that in October, 1873, the plaintiff caused an attachment to be issued in an action against the defendant Hanley; that to prevent the levy of that attachment, the defendants Cook and Polleys executed the statutory undertaking by which they bound themselves jointly and severally to pay any judgment that might be recovered by the plaintiff; that the plaintiff recovered judgment against Hanley in May, 1874, and issued execution, which was returned wholly unsatisfied; that he demanded payment of the sureties, which was refused, wherefore suit is brought. The summons was served on each of the defendants on the day the suit was commenced, June 12, 1874. Polleys demurred; the others made default. After entry of his default, but before judgment, the appellant, Cook, moved upon affidavit and verified answer, to have his default set aside, and for leave to defend. His motion was denied, and the court, upon an application for judgment against him alone, heard testimony and rendered judgment against him for the amount sued for, seven hundred and four dollars and seventy-five cents, leaving the action pending against his

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co-defendants. He now appeals from this judgment and the order overruling his motion for leave to defend, upon two assignments of error:

First. That the judgment against him alone, leaving the action still pending against his co-defendants, is void.

Second. That the court erred in overruling his motion for leave to answer and defend.

The first proposition does not appear to be maintainable. The defendants were severally, as well as jointly, liable. The plaintiff might have sued Cook alone and had judgment against him; and section 149 of the practice act provides that "In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment would be proper." This section of our practice act corresponds with the third subdivision of section 274 of the New York code. I have not found any case in which that provision has been expressly held to sanction the practice pursued in this case. But a decision is reported in 11 Howard, 198, where a precisely similar judgment was set aside upon the ground that the liability of the defendants was not several, but joint only; the clear implication being, that if the liability had been several the judgment would have been upheld. It seems, indeed, to be the plain construction of the law, that where a defendant is severally liable, a separate judgment against him may be entered upon his default, leaving the action to proceed against his co-defendants. And where a defendant by his undertaking has made himself liable to a separate suit, I cannot see that it greatly concerns him ordinarily, whether the plaintiff elect to proceed against him alone before or after commencing his action.

The case of *Stearns v. Aguirre* (6 Cal. 176), was virtually overruled in *Lewis v. Clarkin* (18 Cal. 399).

But the second point made by the appellant seems to be better sustained. His default was entered on June 25. On July 7 he gave notice of his motion to set it aside and for leave to defend, and filed and served his affidavit and the verified answer which he proposed to make if allowed. No

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judgment had been rendered at that time, and none was rendered until the 7th of September following. The plaintiff presented no counter affidavits; and so, for the purposes of the motion, everything disclosed by the affidavit and verified answer of the defendant must be taken for true. They show substantially this state of facts: That Cook signed the undertaking upon which he is sued, upon the representation of Hanley that the sole consideration of the note declared upon in the attachment suit was a gambling debt, of which the plaintiff had notice before assignment by the payee; that he, Hanley, could and would defend the action upon that ground; that this representation as to the consideration of the note, and the knowledge of the plaintiff, was in fact true; that Hanley, instead of defending the action, withdrew his demurrer, and by collusion with the plaintiff, for the purpose of cheating and defrauding Cook, suffered a judgment to be taken against him; that Hanley was totally insolvent, and the purpose of the collusive arrangement was to fasten a liability upon Cook for an illegal demand; that Hanley frequently represented to him that the matter was settled and that he need not trouble himself about it; that when this action was commenced and appellant spoke to Hanley on the subject, he, still acting in collusion with the plaintiff, told appellant not to take any trouble or go to any expense about the suit, as he had an attorney retained who would answer for him; that he was actually induced by these representations, made by procurement of the plaintiff, to neglect to file his answer in time.

I think this shows a sufficient excuse for such neglect. It may be true, as suggested by respondent, that Hanley, by his previous misrepresentations as to the defense and settlement of the attachment suit, had shown himself unworthy of belief, and that Cook ought not to have relied on his promises to see to the defense of this action; but this suggestion should not avail the party who, by his silence, confesses himself *particeps criminis* in the deception.

In the case of *Harper v. Mullory* (4 Nev. 448), the court went quite as far as I should be willing to follow, in denying leave to defend after default. But that case was essen-

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tially different from this. The plaintiff there had not by any fraud or collusion induced the defendant not to answer in time. That fact alone being shown in this case, should have entitled the defendant to leave to defend the action if his proposed answer disclosed a meritorious defense, and he had been guilty of no inexcusable laches. I think there was no such laches. The motion was promptly made and before judgment, and apparently before the plaintiff was prepared to move for judgment. No damage nor any serious delay could have been caused by sustaining it.

It is contended, however, that although it might have been proper for the court below to allow a defense, this court ought not to reverse its order unless we can say that it involved an abuse of discretion. This I understand to be the rule where the facts are disputed; but it does not apply where they are entirely undisputed, as in this case. The question to be decided here is, as in the district court, purely a question of law, and if it appears to have been erroneously decided it is our duty to reverse the decision.

I think it was erroneously decided if the proposed answer disclosed a meritorious defense, which is the only question remaining to be considered.

As to this question, it is not disputed, and, I presume, not doubted, that if Hanley had a good defense to the attachment suit, and, by collusion with the plaintiff, neglected to make his defense for the purpose of defrauding his sureties, these facts would constitute a good defense for them in a suit on their undertaking. (See authorities collected and discussed in *Douglass v. Howland*, 24 Wend. 35; and see *Riddle v. Baker*, 13 Cal. 306.)

Is it, then, a good defense to an action on a promissory note to show that the consideration for which it was given was money won by gambling?

As to whether contracts of wager in general were valid at common law, there is some conflict of opinion disclosed by the American cases, but the weight of authority is so decidedly in favor of their validity that I think there ought never to have been a doubt of it. The ancient common law, however, was altered in respect to this matter by numerous English statutes, and it has been held by this court that English stat-

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utes in force at the date of the declaration of American independence and applicable to our situation, are a part of the common law which we have adopted. (*Ex parte Blanchard*, 9 Nev. 105.) I should have felt some hesitation in coming to this conclusion if the matter had been *res integra*; but I think that after having been once so determined the point should not be unsettled except for very weighty and conclusive reasons; and none such have been suggested in this case.

It follows, therefore, that we have adopted the common law upon the subject of wagers as altered by the statute of 9 Anne, c. 14, by the first section of which it is enacted "that all notes, bills, bonds * * * given * * * by any person or persons whatsoever, where the whole or any part of the consideration * * * shall be for any money or other valuable thing whatsoever, won by gaming, * * * shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," etc. (4 Bac. Ab. 456.)

This, then, is the law of this state, except so far as it may be controlled by our own statutes; and there is nothing that I am aware of in the laws of Nevada to limit its operation except for the protection of a *bona fide* assignee for value of a note or bond, which the statute of Anne makes absolutely void.

Taking the answer of Cook for true, the plaintiff here is not a *bona fide* assignee for value of the note sued on, and a defense which would have been good against the payee is good against him.

The word used in the statute of Anne is "gaming," and that used in Cook's answer and affidavit is "gambling;" but they are defined and treated as synonymous. (See Burrill's and Wharton's Law Dictionaries.)

An objection is made to the answer that it does not show what particular sort of gambling the money in question was won at. But this is an objection, if valid, to be taken by special demurrer to the answer, and is no reason for denying the right to answer.

The judgment should be reversed, and the appellant allowed to file his answer and defend the action.

It is so ordered.

Argument for Appellant.

11 76
12 121
18 282
3* 237
20 47
14* 587

[No. 753.]

C. H. CLARK, APPELLANT, v. MARK STROUSE, RESPONDENT.

SERVICE OF NOTICE OF APPEAL.—Where a copy of the notice of appeal was served on the attorneys for defendant at a certain time and place by “exhibiting to them personally the said copy and by leaving the same in a conspicuous place in their office:” *Held*, a substantial compliance with the statute.

EXTENDING TIME TO FILE STATEMENT ON MOTION FOR NEW TRIAL.—An order signed by the judge extending the time fixed by statute for filing a statement on motion for a new trial, must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute.

AMENDMENT OF RECORDS AFTER ADJOURNMENT OF TERM.—After the term of court expires, the records cannot be amended, unless there is something in the record to amend by.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

F. V. Drake, for Appellant.

I. The statement on the motion for a new trial was not filed in time (practice act, sec. 197), unless the second order of the judge, extending time to defendant to file his statement, restored the statutory waiver and saved to respondent his right to the motion. But this order was *coram non judice* and void. The waiver had accrued and the subsequent order of the judge did not restore it. (*Killip v. Empire Mill Co.*, 2 Nev. 35; *Whitman v. Shiverick*, 3 Nev. 299; *Leech v. West*, 2 Cal. 95; *Hegler v. Henckell*, 27 Cal. 491; *Thompson v. Lynch*, 43 Cal. 482; *Bear River Co. v. Boles*, 24 Cal. 354; *Caldervell v. Brooks*, 28 Cal. 153; *Seeley v. Sebastian*, 3 Oregon, 563.)

II. The date of the order would be presumed to be of the date of filing, and the court could not have amended at the time of the hearing of the motion, for the reason that the term of court in which the order was made had expired. (*Killip v. Empire Mill Co.*, 2 Nev. 35; *Branger v. Challis*, 9 Cal. 351; *Baldwin v. Kramer*, 2 Nev. 583; *De Castro v.*

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Richardson, 25 Cal. 49; *Hegler v. Henckell*, 27 Cal. 492; *Bank U. S. v. Moss*, 6 How. 39; *Lobdell v. Hall* (on petition for rehearing), 3 Nev. 522; *Bowers v. Beck*, 2 Nev. 143; *State v. National Bank*, 4 Nev. 358.)

III. But granting for the purposes of the argument that this record order of the judge was made and signed on or before the 13th of April (the date limited in the first order), still it did not, nor could it be endowed with validity or force, or become in fact an "order," unless filed with the clerk within the time limited in the first order and prior to the waiver. (*Carpenter v. Thurston*, 30 Cal. 123; *Campbell v. Jones*, 41 Cal. 515; *Schultz v. Winter*, 7 Nev. 130.)

IV. Courts have invariably enforced a rigid observance of the statute in all proceedings under the code. Uniformity and certainty in practice could never, otherwise, be established. (*Esterly v. Larco*, 24 Cal. 179; *Elsasser v. Hunter*, 26 Cal. 279; *Jenkins v. Frink*, 27 Cal. 337; *Aram v. Shallenberger*, 42 Cal. 275; *Dean v. Pritchard*, 9 Nev. 233; *McWilliams v. Herschman*, 5 Nev. 263; *White v. White*, 6 Nev. 21; *Sherman v. Shaw*, 9 Nev. 151.)

Mesick & Seely, for Respondent.

By the Court, HAWLEY, C. J.:

It is claimed by respondent that the record failed to show any service of the notice of appeal. The proof of service is contained in an affidavit made by appellant's counsel, wherein he states, that on the 10th day of July, 1875, between the hours of ten o'clock A.M. and four o'clock P.M., he served a copy of the notice of appeal on the attorneys for defendant, by "exhibiting to them personally the said copy, and by leaving the same in a conspicuous place in their office." The statute provides the manner in which service must be made. (1 Comp. L. 1557, 1558, 1559.) When personally made it is by delivery of a copy to the party or his attorneys. If service is made upon the attorneys and they are absent, and there is no person in their office having charge thereof, it may be made by leaving a copy, within certain hours, in a conspicuous place in the

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office. In this case, it appears that the attorneys were present in their office; hence, the service should have been made by delivering to them a copy of the notice; and if so made, this fact ought to have been so stated in a direct way in the affidavit. We think, however, that the fair and reasonable construction to be placed upon the language used in the affidavit is, that appellant's counsel exhibited the copy to the attorneys for defendant, and then left it with them in their office, and that this amounted to a delivery to them of the notice as required by section 496 of the practice act.

From the statement on appeal, we find that the judgment in this case was entered, in favor of plaintiff, on the 24th day of March, 1875. That within five days thereafter the defendant Strouse gave proper notice of his intention to move for a new trial. That on the 2d day of April, 1875, the time for filing a statement on motion for a new trial was, by an order of the district judge filed in said cause, extended until the 13th day of April, 1875. That on the 16th day of April, 1875, an order of the district judge, bearing no date, was filed, extending the time until the 23d day of April, 1875. The statement on motion for a new trial was also filed on the 16th day of April, 1875. These proceedings occurred during the March term of the court.

At the June term of the court, to wit, on the 3d day of July, 1875, the cause was called for hearing upon defendant's motion for a new trial, at which time counsel for plaintiff moved to strike from the files the statement on motion for a new trial upon the ground, among others, that the last order of the judge extending the time to file the statement was extra-judicial and void. Whereupon the court, against the objection of plaintiff's counsel, allowed the defendant to offer testimony tending to prove that said order was made on the 13th day of April, 1875. On the 10th day of July, 1875, the court granted a new trial, from which order this appeal is taken.

Even if we should concede the admissibility of the testimony offered to establish the date when the order was signed, we think it would not benefit the respondent. We are of opinion, that an order signed by the judge, extending

the time fixed by statute for filing a statement on motion for a new trial, must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute. (*Campbell v. Jones*, 41 Cal 518.)

In this case, as the court, by its first order, had extended the time for filing the statement until and including the 13th day of April, 1875, the second order must not only have been signed, but must have been filed within that time. No proof was offered tending to show that it had been so filed.

But the objection made by appellant was well taken, and ought to have been sustained. The record could not be amended after the expiration of the term, except upon proceedings instituted for that purpose prior to the expiration of the term. If a motion had been made to correct the date in the order of the judge during the term of court at which it was filed, the court would have been authorized to hear testimony, and to correct the record so as to conform to the facts. But after the term expired, the record could not be amended unless there was something in the record to amend by.

This general principle is well settled by the decisions in this state. (*Killip v. The Empire Mill Co.*, 2 Nev. 34; *Lobdell v. Hall*, 3 Nev. 523; *The State of Nevada v. The First National Bank of Nevada*, 4 Nev. 358; and in California, *De Castro v. Richardson*, 25 Cal. 51.)

It necessarily follows that the court erred in not granting plaintiff's motion to strike from the files the statement on motion for a new trial. The judge having extended the time to file the statement until the 13th day of April, 1875, and no order appearing in the records of the case to have been made before the expiration of that date, and no statement having been filed within that time, the defendant must be considered as having waived his right to file a statement (practice act, sec. 197); and the court, as was said by Currey, J., in *Hegeler v. Henckell*, "was powerless to rescue the case from the consequences of the defendant's default." (27 Cal. 494; *Whiteman v. Shiverick*, 3 Nev. 299; *Campbell v. Jones*, *supra*.) It is not claimed that any error appears in

Argument for Appellant.

the judgment-roll; and as there was no statement on motion for a new trial which could be regarded by the court, the order granting a new trial must be reversed.

It is so ordered.

[No. 724.]

GEORGE W. PHELPS, RESPONDENT, v. JAMES DUFFY,
APPELLANT.

FOREIGN JUDGMENT—JURISDICTION NEED NOT BE ALLEGED.—In bringing suit upon a judgment recovered in a sister state it is not necessary to allege in the complaint that the court, in which the judgment was rendered, had jurisdiction either of the subject-matter of the action, or of the defendant. Want of jurisdiction is matter of defense.

IDEM—PRACTICE ACT.—If section 59 of the practice act applies to foreign judgments, then the complaint is sufficient in this case, for the reason that it conforms to the provision of this section.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

T. W. W. Davies and Thos. Wells, for Appellant.

I. The complaint in this cause is radically defective. There is no exemplification of the judgment sued upon, nor is there any allegation that the foreign court was a court of record, or of general jurisdiction, or that it had jurisdiction of the subject-matter in this case. Jurisdiction must appear by the record, and is not to be presumed. (*Fisher v. Lane*, 3 Wilson, 303; *Buchanan v. Rucker*, 9 East, 192; *Thurber v. Blackbourne*, 1 N. H. 242; *Hall v. Williams*, 1 Fairf. 278, 286; *Kane v. Cook*, 8 Cal. 449; *Aldrich v. Kinney*, 4 Conn. 380; *Hall v. Williams*, 6 Pick. 232; *Kibbe v. Kibbe*, Kirby's Rep. 119; *Robinson v. Ward's Exrs.*, 8 Johns. 86; *Bissell v. Briggs*, 9 Mass. 462; *Rogers v. Coleman*, Harding's Rep. 423; *Benton v. Burgot*, 10 Sergt. & R. 242; *Borden v. Filch*, 15 Johns. 121; *Goodrich v. Jenkins*, 6 Ohio, 43; *Gwin v. McCarroll*, 1 Sm. & Mar. 368; *Steen v. Steen et al.*, 3 Cushman, 513; *Smith v. Smith*, 17 Ill. 480; 1 Smith's L. Cases, part 2, 1021 *et seq.*)

In the cases cited by respondent, it appears in every case that the court pronouncing judgment was a *court of record*, and that therefore presumption was indulged as to the regularity of the proceedings.

II. Section 59 of the civil practice act of this state is intended to apply to domestic judgments.

A similar section (161) of the New York code has been so construed. (*Hollister v. Hollister*, 10 Howard R. R. 539; *Corwin v. Merritt*, 3 Barb. 341.)

Lewis & Deal, for Respondent.

I. It is only necessary to allege jurisdiction in the court in which the judgment upon which the action was brought in the case of a court whose title indicates that it may be one of limited jurisdiction. Want of jurisdiction is matter of defense. (1 *Estee's Pl. and Forms*, 450, and cases there cited; 1 *Abbott's Forms*, 333; *Wheeler v. Raymond*, 8 Cowen, 314; *Low v. Burrows*, 12 Cal. 188.)

II. It appears from the face of the complaint that the judgment was entered in a court having general jurisdiction. (*Fort v. Stevens*, 17 Wend. 487; 1 *Chitty on Plead.* 371.)

III. The complaint in this case is in accordance with the provisions of section 1122, Comp. Laws. This applies to the judgment of a foreign court. (*Halstead v. Black*, 17 Abb. Pr. 228.)

By the Court, BEATTY, J.:

This is a suit upon a judgment. There was a general demurrer to the complaint, which was overruled, with leave to answer. Failing to answer in time, the defendant was defaulted, and judgment thereupon entered for the plaintiff. On appeal from the judgment, the only question presented is this: Does the complaint state facts sufficient to constitute a cause of action? The specific objection to the complaint urged upon the argument is, that it does not show that the court in which the judgment is alleged to have been recovered had jurisdiction either of the subject-matter of the action or of the defendant. The portion of the complaint to

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which this objection applies is as follows: "That on, etc., at the city and county of San Francisco, state of California, in the district court of the fourth judicial district of the state of California in and for the said city and county of San Francisco, in an action therein pending between plaintiff and defendant, said court last above-mentioned, duly adjudged that plaintiff should have and recover," etc.

In support of the demurrer, we have been referred to a great many cases in which it has been held that a judgment has no validity outside of the state in which it has been obtained, unless the court by which it was given had jurisdiction of the subject-matter and of the parties. This proposition is not disputed; and there can be no doubt that, in an action of this kind, where the fact of jurisdiction is put in issue by proper pleadings, the plaintiff must fail at the trial, unless he can show the facts necessary to confer jurisdiction. But whether jurisdiction must be alleged in the complaint, either in general terms or by specific averment of the facts necessary to confer it, is another question. Very few of the cases cited by appellant touch this question; and there is but one in which it was directly involved and decided. That was the case of *McLaughlin v. Nichols* (reported in 13 Abb. Pr. R. 244), decided by the supreme court of the second district of New York. No other case that has fallen under my observation goes to the same extent; and that case is scarcely reconcilable with the decisions of other courts of higher authority in New York. It has, however, led both Wait and Abbott, in their works upon forms and practice, to state the rule to be that the complaint, in this class of actions, must at least show that the court in which the judgment was rendered was a court of general jurisdiction. Estee states the rule otherwise. In view of this diversity of opinion, it becomes important to inquire what were the approved precedents for declarations upon foreign judgments in England before the new rules of pleading introduced by the adoption of the code.

These precedents will be found in the second volume of Chitty's Pleadings, pp. 244 and 413; and neither those in debt (which was the proper form of action on the judgment

of a sister state) nor those in assumpsit contain any allegation as to the jurisdiction of the court. These precedents are founded upon decisions made before and about the time of the revolution by the courts of highest authority in England. In framing them, Mr. Chitty had the case of *Walker v. Witter* (1 Doug. 5), decided by Lord Mansfield in the King's Bench in 1778, directly in view, and the form he gives of a declaration in debt upon a Jamaica judgment is taken from the declaration in that case, leaving out what the court there decided to be surplusage; among other things, the statement that the court in Jamaica was a *court of record*.

The authority of Mr. Chitty upon questions of pleading has always been very high, and there can be no doubt that his precedents have been generally followed in this country in the numerous actions upon state judgments that have been brought since their publication. The fact that but one case can be found in which the form of declaration sanctioned by him has been held substantially defective, is the strongest sort of proof that it is generally esteemed sufficient. In fact, it is clearly to be implied from the language of many of the cases that want of jurisdiction is matter of defense. It seems to be established that defendant can take advantage of it by pleading the general issue; but there never could have been any question of this, as there frequently has been, if it had been considered necessary that the declaration should allege jurisdiction.

The case of *Kibbe v. Kibbe* (Kirby, 119), was decided in Connecticut in 1786, before Chitty wrote, but after Lord Mansfield's decision in *Witter v. Walker*, *supra*. The attorneys in that case certainly did not understand the rule to be as contended for. For the defendant having pleaded specially want of jurisdiction in the foreign court, the plaintiff *replied* the facts which he claimed gave jurisdiction. Issue in law was finally joined upon demurrer to the sur-rejoinder.

Of course, under the rule that judgment must be given upon the whole record against the party who has committed the first fault in pleading, it was proper for the court to pronounce upon the sufficiency of the declaration. This

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they did, and decided that it was fatally defective, because it did not allege facts necessary to confer jurisdiction. It is evident, however, that this point was not necessarily in question, because the pleadings subsequent to the declaration showed affirmatively that the foreign court did not have jurisdiction.

The case of *Thurber v. Blackbourne* (1 N. H. 242), was also decided upon the ground that the *record* did not show jurisdiction in the foreign court. But I am inclined to infer, from the language of the opinion, that the judgment in that case had been pleaded with a *profert*, and set out upon *oyer* demanded, and that the record spoken of was not the pleadings in that case, but the exemplified judgment of the foreign court. But however this may be, there are no other cases that support the appellant, and the authority of these cases is very weak against the strong negative testimony in favor of the correctness of Chitty's forms.

The case of *Newell v. Newton* (10 Pick. 470), is not in point, for that involved the sufficiency of a plea in abatement, upon the ground of the pendency of another action for the same cause in another state. Pleas in abatement are judged by stricter rules than declarations; they must be certain to every intent, and defects in them may be reached by general demurrer, which in declarations can only be reached by special demurrer.

The case of *Wheeler v. Raymond* (8 Cowen, 311), also involved the sufficiency of the same plea, and it was sustained. *A fortiori* a declaration in substance the same would have been held good. Yet, in that case it was not alleged that the Vermont court was one of general jurisdiction; neither were all the facts necessary to confer jurisdiction alleged. This was one of the objections taken to the plea, and in reference to which the court says (p. 314): "In pleading the judgments of courts of limited jurisdiction, it is necessary to state the facts upon which the jurisdiction of such courts is founded; but with respect to courts of general jurisdiction, such averments are not necessary." From which it appears that in the absence of any allegation on the subject, the court in Vermont was presumed to be a

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court of general jurisdiction. This was certainly in conflict with the case of *McLaughlin v. Nichol*, *supra*. (See also 17 Wend. 485.)

My conclusion is, that the complaint in this case is sufficient, without reference to any of the provisions of our practice act. If section 59 applies to suits upon foreign judgments, as is held in *Halstead v. Black* (17 Abb. Pr. R. 227), and there is no decision to the contrary, it is sufficient, for the reason that it conforms to the provisions of that section.

Judgment affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1876.

[No. 709.]

IN THE MATTER OF THE ESTATE AND GUARDIANSHIP OF MARY WINKLEMAN, A MINOR. JOHN C. BADENHOOF, APPELLANT, v. J. R. JOHNSON, RESPONDENT.

APPOINTMENT OF GUARDIAN—INTEREST OF MINOR.—In the appointment of a guardian the interest of the minor is the paramount consideration. The parental request is entitled to great weight and ought to prevail unless good reason to the contrary be shown.

IDEM—HOW MADE.—The district judge has no authority to appoint any person guardian of the person or estate of a minor except upon a written petition in his behalf and after notice of his application.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

Robert M. Clarke, for Appellant.

G. P. Harding, for Respondent.

By the Court, BEATTY, J.:

Mary Winkleman, an infant, was left an orphan by the death of her father on the 5th of February, 1874. The respondent petitioned to be appointed guardian of her person and estate, and was so appointed on February 10, 1874. The order appointing him was reversed by this court

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on the appeal of the present appellant upon the ground that it had been made without notice to the relatives of the minor. (See 9 Nev. 303.)

Afterwards respondent and appellant each filed a petition in his own behalf to be appointed guardian, and notice to the relatives was given. The hearing of these petitions was continued from time to time, and finally both were heard together. At the hearing a large amount of testimony was offered by each of the applicants for the purpose of proving his own fitness for the trust and the unfitness of the other. The district judge thereupon appointed respondent guardian of the estate of the minor, and the respondent and appellant, jointly with a Mr. Frevert, guardian of her person. From these orders the appeal is taken. There is no properly authenticated statement on appeal, but by stipulation of the parties certain testimony embodied in the transcript, is to be considered by the court for the purpose of determining whether the judgment and decision of the court was contrary to law in any respect.

It is contended in the first place that the court erred in refusing to appoint appellant, and in appointing respondent, because it was the dying request of the father of the minor that appellant should be appointed. But the law is, that the interest of the minor is the paramount consideration; and although the parental request is entitled to great weight, and ought to prevail in the absence of good reasons to the contrary, yet it is not conclusive, and must be disregarded when the interests of the ward plainly require it. (See 9 Nev. 303, and authorities cited by appellant in that case.) Whether the testimony in this case was sufficient to justify the district court in refusing to appoint the person designated by the dying request of the father, is a question which the condition of the record and the terms of the stipulation above mentioned preclude us from considering.

The only other point relied upon is that the court erred in appointing Frevert one of the joint guardians of the minor's person. Frevert had filed no petition to be appointed, and of course no notice of an application by him had been given to the relatives. It is argued that the pro-

bate judge has no authority to appoint any person guardian of the person or estate of a minor except upon a written petition in his behalf, and after notice of his application. This seems to be a fair if not the only construction of the law (Comp. L., sec. 833), and clearly appears to be the safest and the best; for to hold that upon the petition of A. and notice thereof to the relatives, B. or C. could be appointed guardian, might often deprive those interested of any opportunity of opposing an improper appointment. It follows, from this view of the law, that the appointment of Frevert was erroneous. But the difficult and embarrassing question remains; what order ought this court to make under the circumstances? There seems to be little doubt that if the appointment of Frevert as one of the joint guardians of the person is set aside, the appointment of the other joint guardians should also be set aside, because we cannot know that either would have been appointed except in conjunction with the other two. But the appointment of Johnson as sole guardian of the estate, although embraced in the same order by which the joint guardians of the person were appointed, is really an independent act; and as the statute authorizes the appointment of separate guardians of the person and estate, it does not seem very clearly to follow that because one part of the order is invalid it should be wholly set aside. We have concluded, however, after much consideration, that, as the estate of the minor must be subjected to the cost of another proceeding for the appointment of a guardian or guardians of her person, and as the hearing of that application will involve all the matters in controversy in this proceeding, and since the selection of a guardian for the person may be in some measure dependent upon the guardianship of the estate, it would be better to reverse the order completely and remit the whole matter to the unembarrassed discretion of the district judge.

The order appealed from is reversed and the cause remanded, with leave to appellant, respondent and all parties interested to make application for the guardianship; personal notice of the hearing to be served on the relatives and those entitled to notice at least five days before the same is brought on.

Argument for Petitioner.

11 90
11 440

[No. 771.]

EX PARTE PETER LARKIN.

CONTINUANCE OF CRIMINAL CASE FOR THE TERM—SECTION 2207 COMPILED LAWS.—In construing section 582 of the criminal practice act: *Held*, that the fact that a disastrous fire had occurred destroying the courthouse and so much of the city of Virginia as to render it impossible for the court to find a suitable room in which to meet, was sufficient to authorize the court to continue the trial of causes for the term.

IDEM.—Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a condition of affairs exists that is notorious, and about which, from its very nature, there could be no conflict, the court is authorized, of its own motion, to continue the causes for the term. (*Ex Parte Stanley*, 4 Nev. 116, affirmed.)

SETTING CAUSES FOR TRIAL DURING THE TERM.—The regulation of the business of the term is a matter exclusively within the control of the judge, and cannot be interfered with by this court upon a writ of *habeas corpus*.

SECTION 582 OF CRIMINAL PRACTICE ACT CONSTRUED.—Section 582 of the criminal practice act (1 Comp. L. 2207) is intended to prevent arbitrary, willful or oppressive delays; and whenever this appears to be the case, the defendant is entitled to be discharged.

HABEAS CORPUS before the Supreme Court.

The facts are stated in the opinion.

Louis Branson and L. T. Cowie, for Petitioner.

I. No showing was made, and no reason, in fact, given for either of the orders made by the court adjourning the hearing of the case.

II. The record in this case does not show that the destruction of the indictment by fire, or the sickness of the district attorney, were in fact the causes or reasons that moved the mind of the court to make the orders, nor were they the real reasons, in fact, which lay at the foundation of the orders.

III. The cause not having been tried at the October term, and no showing made, and no reason in fact existing for the order of October 28, the district court had but one duty to perform—to dismiss; and having refused to do this, the prisoner's right to be discharged from custody became absolute and unequivocal.

IV. The orders of the court being on their face void, the record cannot be helped by proving facts not judicially established at the time of the making of the orders, and which might or might not have entered into the consideration of the court at the time of making the orders complained of, and which have not been shown to have entered into the mind of the court, either by "showing," or of the court's own knowledge. In support of these views counsel cite Comp. Laws, secs. 1058, 1684, 2207; Whart. Am. Laws, secs. 2922, 2923; 1 Archibald, 566, 572; *Commonwealth v. Phelps*, 16 Mass. 425; *Ex parte Stanley*, 4 Nev. 113; *Green's Case*, 1 Rob. 731.

J. R. Kittrell, Attorney-General, and Lindsay & Dickson,
for the State.

By the Court, HAWLEY, C. J.:

Petitioner having been indicted at the June term, A. D. 1875, of the district court in Storey county, and not having a trial at the next term of the court, asks to be discharged from custody in pursuance of section 582 of the criminal practice act, which provides: "If a defendant, indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court at which the indictment is triable, after the same is found, the court shall order the indictment to be dismissed, unless good cause to the contrary be shown." (1 Comp. L. 2207.)

It was argued by counsel for the state that this question could not be raised upon *habeas corpus*, and it was so decided in *Ex parte Wallon* (2 Whart. 501), upon the ground that the power to dismiss is confined to the court in which the indictment is pending. But in *Green v. The Commonwealth* (1 Robinson, 731), it was held by a majority of the judges, in construing a similar statute, that as the prisoner was entitled by law to his discharge, and as the court below had failed to make the order, the prisoner was entitled upon *habeas corpus* to be discharged from bail, and it was so ordered. As we are of opinion that petitioner is not entitled to his

Opinion of the Court—Hawley, C. J.

discharge upon the facts presented, it is unnecessary to determine this question, and we therefore, for the present, waive it.

Petitioner was indicted on the 16th day of September, 1875, arraigned on the 17th, and entered his plea of not guilty on the 20th of the same month, when the further hearing of said cause was continued until the October term. On the 12th of October the cause was called for trial, and after two days of unsuccessful efforts to obtain an impartial jury the cause was continued until the 18th of October, when, by the consent of the respective parties, it was continued until the 6th of December, 1875. So far, it is admitted that the court proceeded with all due and reasonable dispatch in order to give the defendant a speedy trial.

On the 28th day of October, 1875, the court met, and after reciting the fact that the court "having adjourned on the 25th day of October, A. D. 1875, until the 26th day of October, A. D. 1875, at the hour of 10 o'clock A. M., and at said day and hour the court being unable to meet by reason of the fire which consumed the court-house and court-room, now, at this date, * * * being as soon a time as the court could meet, and as soon a time as a suitable place could be obtained after the said fire, the court meets at number sixty-six South C street, in the city of Virginia, county of Storey and state of Nevada," the minutes of the court show that orders were made providing for the substitution of papers and pleadings in the place of originals that were destroyed by the fire. After which the following orders, that are objected to by petitioner, appear:

"IN THE MATTER OF VACATING ORDERS, ETC.

"On motion of W. E. F. Deal, Esq., the members of the bar consenting thereto, it is ordered by the court that all orders heretofore made by the court at this, the October, term of said court, setting causes for trial, be vacated, and the same are hereby vacated and set aside. Louis Branson, Esq., attorney for defendant in the cause of the *State of Nevada v. Peter Larkin*, excepts to said order, continuing said cause, on the part of said defendant."

“IN THE MATTER OF CONTINUING CAUSES, ETC.

“On motion of Jonas Seeley, Esq., the members of the Storey county bar consenting thereto, it is ordered by the court that the trial of all causes at this term of said court (except on stipulation) be and the same are hereby continued until the January term, A. D. 1876, of this court.”

“IN THE MATTER OF EXCUSING TRIAL JURORS.

Now, it appearing to the court, that there is no more use for trial jurors at this term, it is ordered by the court that all trial jurors at this term be, and the same are hereby excused for the term. Louis Branson, Esq., excepts to said order on the part of Peter Larkin, the defendant, in the cause of the *State of Nevada v. Peter Larkin*.”

Upon the same day an order was made requiring the county commissioners to provide a suitable room for the court to hold its meetings in.

The fact that a disastrous fire had occurred, destroying the court-house and so much of the city of Virginia as to render it impossible for the court to find a suitable room in which to meet, was, in our judgment, sufficient to authorize the court, in the exercise of its sound discretion, to make said orders. Recognizing the unsettled condition of affairs after such a fire, the members of the bar, with but one exception, consented to said orders being made, considering, as they doubtless did, that a public necessity existed therefor.

The cause which induced the court to make said orders was not, as is alleged in the petition, “for the personal convenience of the court.” The orders were made in consequence of a great public calamity that had befallen the city, and in obedience to the wishes of the members of the bar, who were sufferers by the fire, and were evidently made to promote—not to hinder—the interests of public justice. The petitioner is not in a condition to complain. If he has endured hardships by being so long incarcerated in the county jail, it was by no oppressive act or fault of the district court; but was incident to his situation and to the

chaotic condition of affairs existing in Virginia City after said fire.

The objection of petitioner's counsel was not, however, so much that the facts did not justify the orders as that there was no showing made by the prosecution; no affidavit for continuance. This position is alike untenable. The fact of the fire, the destruction of the court-house and court-room, was as well known to the judge as if it had been presented by affidavits from every resident of the city; that there had been such a fire was a matter of ocular demonstration and needed no proof. Courts usually require, and ordinarily should require, a showing to be made by affidavits in order to continue causes for the term when such orders are objected to by either party; but when a condition of affairs exists that is notorious, and about which, from its very nature, it is apparent there could be no conflict, it would be an idle ceremony to require affidavits setting forth the existence of such fact in order to authorize the court to act.

Suppose that when court is in session a fire breaks out in the building and is witnessed by the judge, would any one question his authority to adjourn court of his own motion until the danger was over, without requiring an affidavit showing that the building was on fire? In such a case would it not be absurd to declare that the judge could not act upon his own knowledge?

In the present case, the facts being necessarily known to the judge, no proof was required.

In *Ex parte Stanley* this court decided that the district court, after making an unsuccessful effort to obtain a jury at one term, had the right upon its own knowledge of the fact to continue the cause until the next term, if at such a term a trial could probably be had. (4 Nev. 116.)

We think the court was fully justified in making the orders it did, and that the records of the court show good cause for continuing the case for the term and for refusing to discharge the defendant from custody.

The orders made at the January term, A.D. 1876, passing petitioner's case when called, and giving time to the prose-

cution until the 21st day of February, A. D. 1876, to make proof "of the destruction and loss of the indictment in said cause as a predicate upon which to move the court for a *nolle prosequi* in said action, for the purpose of resubmitting said cause to the present grand jury for their consideration," cannot be reviewed. The cause was not continued for the term, and we are satisfied that the regulation of the business of the term is a matter exclusively within the control of the judge and cannot be interfered with by this court, certainly not in this proceeding.

It is a well-settled legal principle that every defendant, held on a criminal charge by indictment, is entitled to a speedy trial, and this right should never be denied; but it does not necessarily follow that such trials are to be had regardless of the public condition of affairs that exists where the court is held. Ordinarily, the defendant is entitled to his trial as soon as it can properly be reached in its regular order upon the calendar, and the prosecution has had a reasonable time to prepare for the trial; but unforeseen events are liable to occur, making it absolutely necessary for a court to continue cases, even on its own motion; and whenever such events do occur, and the necessity for such order is clearly apparent, its power to so continue the case is undoubted.

Section 582 of the criminal practice act is intended to prevent arbitrary, willful or oppressive delays; and whenever this appears to be the case, the defendant is entitled to be discharged. In this case there is no ground for any imputation whatever against the court.

The petitioner is remanded.

[No. 768.]

H. G. MARGAROLI, RESPONDENT, v. THOMAS MILLIGAN, APPELLANT.

CONFLICT OF EVIDENCE—NEW TRIAL.—The rule laid down in *Treadway v. Wilder* (9 Nev. 70), as to the weight of evidence on motion for new trial, affirmed.

COUNTER-CLAIM—HOW ESTABLISHED.—The defendant, alleging a counter-claim, must establish it to the satisfaction of the jury by a preponderance of evidence.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are sufficiently stated in the opinion.

George W. Baker and John T. Baker, for Appellant.

The court has one province, the jury another; and when the court grants a new trial without sufficient reason appearing therefor, the appellate court will reverse the order. (*Lawrence v. Burnham*, 4 Nev. 361; *Scott v. Haines*, 4 Nev. 426.)

Thomas Wren, for Respondent.

Refusing or granting a new trial will not be disturbed except where there is a gross abuse of discretion, nor where the decision of the court is upon bare questions of fact. (*Speck v. Hoyt*, 3 Cal. 413; *Smith v. Billett*, 15 Cal. 26; *Hanson v. Barnhisel*, 11 Cal. 340; *Kimball v. Gearhart*, 12 Cal. 27; *Scannell v. Strahle*, 9 Cal. 177; *Weddle v. Stark*, 10 Cal. 301; *Preston v. Keys*, 23 Cal. 193; *Wilcoxson v. Burton*, 27 Cal. 232; *Wilkinson v. Parrott*, 32 Cal. 102; *Phillipotts v. Blasdell*, 8 Nev. 61.)

By the Court, HAWLEY, C. J.:

This appeal is from an order of the court granting a new trial.

The action was brought by plaintiff to recover the sum of \$731.75, alleged to be due and owing him for cutting wood and burning charcoal, at a stipulated price per bushel. The

defendant denies the contract as alleged by plaintiff, and sets up in his answer the contract which he admits existed between himself and the plaintiff; pleads a set-off upon a promissory note; avers that the suit was commenced before the contract was completed, and that by the terms of the contract he had the right to retain ten per cent. of the contract price until plaintiff fulfilled his contract; and further alleges that he has suffered damages by reason of the failure of plaintiff to comply with his contract. "Wherefore defendant asks judgment against the plaintiff in the sum of \$186.44," etc.

The jury found a verdict in favor of plaintiff for the sum of \$204.

The plaintiff thereupon moved for a new trial, which was granted by the court upon two grounds, which we are asked to review. First, that the verdict was contrary to the evidence. Second, that the court erred in giving defendant's third instruction, which reads as follows: "The burden of proving everything to entitle plaintiff to recover, is cast on the plaintiff. And if plaintiff and defendant differ in their testimony in regard to the number of bushels of coal at ten cents and thirteen and one-half cents, you must be satisfied by a preponderance of testimony in favor of plaintiff, before you can adopt his account over that of the defendant." The testimony was conflicting.

1. Under the rule laid down by this court in *Treadway v. Wilder*, (9 Nev. 70), we think that the order of the court granting a new trial must be sustained.

2. In order to sustain the counter-claim, the defendant was required to establish it to the satisfaction of the jury by a preponderance of evidence; and without this qualification the first clause in the instruction may have misled the jury to the prejudice of plaintiff.

The order granting a new trial is affirmed.

Points decided.

[No. 761.]

THE STATE OF NEVADA, RESPONDENT, *v.* THOMAS
W. RAYMOND, APPELLANT.

INDICTMENT FOR MURDER.—An indictment for murder, drawn in the approved form of the common law, *held* sufficient.

ENTIRE CHARGE OF THE COURT MUST BE CONSIDERED.—The entire charge of the court must be considered, in determining the correctness of any portion of it, and if it clearly appears therefrom that no error prejudicial to defendant has been committed, the judgment will not be disturbed.

DEFINITION OF MALICE.—Where the court gave the general definition of malice, instead of the legal definition: *Held*, that the legal definition is more comprehensive, and that if any error occurred, it was against the state and in favor of the defendant.

CHARGE OF THE COURT—MURDER THE RESULT OF MALICE.—The court after giving the statutory definition of murder and manslaughter, and the general definition of malice, charged the jury as follows: "From the foregoing, then, it will be seen that murder is the result of malice; manslaughter the result of sudden passion, heat of blood, anger, when the defendant is supposed not to be master of his own understanding." *Held*, not erroneous.

REASONABLE DOUBT.—*Held*, that the charge of the court and instructions given in regard to reasonable doubt were as favorable to the defendant as the law would warrant.

HOMICIDE—NOT JUSTIFIED BY PROVOCATION.—The court charged the jury: "No provocation can justify or excuse homicide, but may reduce the offense to manslaughter. Words or actions, or gestures, however grievous or provoking, unaccompanied by an assault, will not justify or excuse murder; and when a deadly weapon is used, the provocation must be great to make the crime less than murder." *Held*, correct.

MURDER IN THE FIRST DEGREE.—The court charged the jury as follows: "If the jury believe, from the evidence, that the defendant did, with malice aforethought, willfully, deliberately, and premeditatedly assault the man Mooney, with the intent then and there to kill him, and while so engaged did kill the man Twiggs, then you will find the defendant guilty of murder in the first degree:" *Held*, correct.

MURDER IN THE SECOND DEGREE.—The court said in its charge: "If the jury believe * * * that the defendant did, with malice aforethought, but without willful, deliberate premeditation assault the man Mooney, with the intent then and there to do him great bodily harm, and while so engaged did kill the man Twiggs, you will find the defendant guilty of murder in the second degree:" *Held*, correct.

MANSLAUGHTER.—The instruction in the court's charge that: "If the jury believe that the defendant did, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, assault the man Mooney, and while so engaged did kill the man Twiggs, you will find the defendant guilty of manslaughter:" *Held*, correct.

Statement of Facts.

UNLAWFUL ACT.—The court charged the jury as follows: "If the jury believe from the evidence that the defendant assaulted the man Mooney with a pistol loaded with powder and leaden balls, and while so doing, did fire off the said pistol at or upon said Mooney, then he was in commission of an act which in its consequences naturally tends to destroy human life, and was unlawful, unless you find he was justified or excusable in so doing:" *Held*, that when taken in connection with the other instructions defining murder, justifiable and excusable homicide and self-defense, it is not erroneous.

IDEM.—The court further charged the jury: "If you believe from the evidence that the defendant was engaged in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or was in the prosecution of a felonious intent, and while so engaged killed the man Twiggs, you will find the defendant guilty of murder:" *Held*, that when considered with the other portions of the charge, it is not erroneous.

CHALLENGE TO JURORS.—A challenge to the panel of jurors, upon the ground that one juror expressed actual bias against the prisoner, and other jurors expressed themselves in such a manner as to imply bias upon their part, and that the law permitting said jurors to be of the panel is unconstitutional, cannot be considered as an objection to the panel of jurors.

CHALLENGE FOR IMPLIED BIAS MUST STATE THE GROUND OF CHALLENGE.—When the defendant challenges a juror for implied bias, he must specify the particular grounds upon which he bases his challenge.

QUALIFIED OPINION OR BELIEF.—A juror who has formed and expressed an opinion that was not unqualified, is not a disqualified juror, especially when he declares that he did not entertain any deliberate or fixed opinion or belief as to the guilt or innocence of the defendant.

CHALLENGE FOR CAUSE ERRONEOUSLY REFUSED—WHEN NOT PREJUDICIAL ERROR.—If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for the want of another challenge.

VERDICT CONTRARY TO EVIDENCE.—This court will not reverse a judgment in a criminal case on the ground that the verdict is contrary to the evidence, when there is any evidence to support it.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendant was indicted for the murder of Frederick Twiggs, tried and found guilty of murder in the second degree, and sentenced to ten years' imprisonment at hard labor in the state prison.

Statement of Facts.

The indictment, after the proper caption, reads as follows:

"The jurors of the grand jury of the county of Washoe, in and for the state of Nevada, impaneled, sworn and charged to inquire of offenses committed within the county of Washoe, * * on their oaths aforesaid do present and find: That one Thomas Raymond, late of the fair grounds near the town of Reno, * * * on the twenty-third day of August, in the year of our Lord one thousand eight hundred and seventy-five, and before the finding of this indictment, with force and arms at the fair grounds near the town of Reno, in the county of Washoe, state of Nevada aforesaid, in and upon one Frederick Twiggs, feloniously, willfully and of his malice aforethought, did make an assault; and that the said Thomas Raymond a certain pistol, then and there charged with gunpowder and one leaden bullet, then and there feloniously, willfully and of his malice aforethought, did discharge and shoot off to, against and upon the said Frederick Twiggs; and that the said Thomas Raymond, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by the force of the gunpowder aforesaid, by the said Thomas Raymond discharged and shot off as aforesaid, then and there feloniously, willfully and of his malice aforethought, did strike, penetrate and wound the said Frederick Twiggs, in and upon the right eye of the said Frederick Twiggs, giving to the said Frederick Twiggs, then and there, with the leaden bullet aforesaid, so as aforesaid, discharged and shot out of the pistol as aforesaid by the said Thomas Raymond in and upon the right eye of the said Frederick Twiggs, one mortal wound of the depth of six inches and of the breadth of half an inch, of which said mortal wound the said Frederick Twiggs then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Thomas Raymond the said Frederick Twiggs, in the manner and by the means aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, contrary to the statute, ****."

This indictment was "presented in open court by the foreman of the grand jury in presence of the grand jury," and

Statement of Facts.

properly indorsed and filed on the ninth day of September, A. D. 1875.

The defendant by his attorneys moved the court to set it aside upon the grounds: "First. That it does not appear from the indictment that the same was found by the grand jury of the second judicial district in which this court is held. Second. For the causes set forth in the demurrer herewith filed."

The demurrer interposed to the indictment set forth the following grounds: "First. That the grand jury, by which it was found, had no legal authority to inquire into the offense charged by reason of its not being within the local jurisdiction of this court. Second. That it does not substantially conform to the requirements of sections 234 and 235 of the criminal practice act: in this, that it does not state the offense charged in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Third. That the facts stated in the indictment do not constitute a public offense."

It appears from the testimony that the defendant Raymond and a man by the name of Mooney engaged in a quarrel at the stables on the fair grounds near Reno, and commenced shooting at each other. After the firing was over, it was discovered that one Frederick Twiggs, a stranger to the defendant, had been killed. The deceased was found dead in one of the stalls in the rear of where Mooney stood during the shooting. The testimony tended strongly to show that Twiggs was killed by one of the pistol-shots fired by the defendant Raymond at Mooney. The testimony also tended to show that the defendant was the transgressor, and commenced the quarrel with Mooney.

The instructions objected to by defendant's counsel and referred to in the opinion, appear in the head-notes.

The other facts are sufficiently stated in the opinion.

The appeal is from the judgment and from the order of the court refusing to grant the defendant a new trial.

Argument for Appellant.

Wm. M. Boardman and S. A. Mann, for Appellant.

I. The court erred in overruling the motion to set aside the indictment, and in overruling the demurrer to the indictment.

II. The court erred in overruling defendant's objection to the testimony of R. K. Allen, and allowing it to go to the jury, and be considered by them as evidence in rebuttal.

III. The court erred in overruling the defendant's challenge to the jurors McClintock, Peers, Fredericks, Francisco and Wilson. The examination of the jurors show that they had formed or expressed an unqualified opinion, and such an opinion as to render them incompetent to serve as jurors. The court also erred in overruling defendant's objection to the panel of the jury.

IV. The court erred in the instruction given to the jury, that "no provocation can justify or excuse homicide, but may reduce the offense to manslaughter," etc. If this instruction is correct, it would take away the right of self-defense in most instances until it became too late. (*State v. Newton*, 4 Nev. 410; *People v. Pond*, 8 Mich. 150; *People v. Taylor*, 36 Cal. 255; *Commonwealth v. Selfridge*; *People v. Butler*, 8 Cal. 441.) It assumes that an offense has been committed, and that the deceased was wrongfully killed. (*People v. Williams*, 17 Cal. 147; *People v. Gibson*, 17 Cal. 285; *People v. Ybarra*, 17 Cal. 171.)

V. The court misdirected the jury as to the legal definition of malice. (*People v. Taylor*, 36 Cal. 255; 34 Cal. 48.)

VI. The court erred in instructing the jury: "From the foregoing it will be seen that murder is the result of malice," etc. This instruction is calculated to mislead the jury. The inference to be drawn from it is, that if the defendant had malice, he must therefore be guilty of murder.

VII. The court erred in instructing the jury upon reasonable doubts, that "such doubt should not be merely capacious, but such as is entirely consistent with the theory of the defendant's innocence." (1 Greenl. Ev., sec. 29; *People v. Padilla*, 42 Cal. 535; *People v. Campbell*, 30 Cal. 315; *Wills on Circum. Evid.* 171-175; 41 Cal. 66.)

Argument for Respondent.

VIII. The court erred in its charge to the jury as to the crime of murder in the first degree. The instruction leaves out the doctrine of the law in respect to the right of self-defense. All the elements and conditions mentioned in the instructions might have existed and yet the defendant not have been guilty of murder in the *first degree*. (*People v. Campbell*, 30 Cal. 315.)

IX. The court erred in defining murder and manslaughter, and in giving a definition to the term "unlawful act." In these instructions the court assigns a conclusive effect to the circumstances, and assumes that they are proved. (*People v. Lewis*, 16 Cal. 99; *People v. Dick*, 32 Cal. 213.)

X. The verdict is against the law and the evidence. (*People v. Taylor*, 36 Cal. 258; 2 Whar. 993, 1019, 1023; 1 Bish. Cr. Law, sec. 849.)

J. R. Kittrell, Attorney-General, for Respondent.

I. The indictment is sufficient. (*People v. Lloyd*, 9 Cal. 54; *People v. Dolan*, 9 Cal. 576; *People v. Rodriguez*, 10 Cal. 50; *People v. Thompson*, 4 Cal. 238; *People v. White*, 34 Cal. 183; 1 Comp. L., secs. 236, 243, 244.)

II. The testimony of R. K. Allen is in strict rebuttal of the testimony given by the appellant in his own behalf on the trial. Even if it were not, I apprehend that it is within the discretion of the court to permit a witness to be recalled at any stage of the trial to explain his testimony previously given, or to enlarge the same.

III. The challenge made to the jurors McClintock, Peers, Fredericks, Francisco and Wilson, as a challenge to the panel was improperly made. (1 C. L., secs. 322, 324; *State v. Millain*, 3 Nev. 409.)

IV. A challenge for implied bias must state some one of the causes enumerated in the statute. (*People v. McGungil*, 41 Cal. 430; *People v. Hardin*, 37 Cal. 258; *People v. Dick*, 37 Cal. 379.)

V. The instructions of the court state the law, and are upheld and supported by a host of well-considered cases. (2 Whart. C. L., sec. 970, and cases cited; 2 Whart. C. L., secs. 965, 997-99.)

By the Court, HAWLEY, C. J.:

1. The indictment in this case is for murder and is drawn in the approved form of the common law. The motion to set it aside and the demurrer thereto were properly overruled. The objections made are frivolous.

2. We think the testimony of the witness Allen was properly admitted in rebuttal of the testimony of the defendant.

3. The several objections to the court's charge are not well taken. It is well settled that the entire charge of the court must be considered, and if it clearly appears therefrom that no error prejudicial to defendant has been committed, the appellate court will not disturb the judgment. The specific objections urged by counsel are not deserving of any extended review. The charge upon the question of provocation is fully sustained by the authorities. (Wharton's Am. Cr. L., secs. 970-1.)

The court, in instructing the jury as to what constituted malice, gave the general instead of the legal definition of the word. If we admit that the legal definition has a different meaning from the general definition given by Webster and used by the court, it is apparent that the legal definition is more comprehensive, and if any error occurred it was against the state and in favor of the defendant. (*State v. Stewart*, 9 Nev. 131; *Commonwealth v. York*, 9 Met. 104.)

The phrase, "from the foregoing it will be seen that murder is the result of malice," when taken in the connection where it appears, is not erroneous. The court had clearly and correctly defined the degrees of murder and had properly instructed the jury as to the law of self-defense, and there is not even a bare possibility that the jury could have been misled upon the question as to what facts were necessary to constitute the crime of murder.

The same may be said of the clause objected to in regard to reasonable doubt. "Such doubt, moreover, should not be merely captious, *but such as is entirely consistent with the theory of the defendant's innocence.*" Every doubt which a

juror entertains of defendant's guilt must, in a legal sense, be consistent with the theory of defendant's innocence, and it is difficult to determine what particular qualification of the term "reasonable doubt" was intended to be given by the insertion of the words we have italicized. But in no sense could the jury have been misled to the prejudice of the defendant. Immediately preceding the clause in question, the court charged the jury, that "the defendant is presumed in law to be innocent until the contrary is proven, and in case of a reasonable doubt existing in your mind, whether his guilt be satisfactorily shown, he is entitled to be acquitted." Immediately after, the court adds: "You must be convinced of the guilt of the defendant before you convict him." Again, at the request of defendant's counsel, the court gave this instruction: "The jury must be entirely satisfied of the guilt of the defendant, or they must acquit him."

The charge and instruction upon this point were certainly as favorable to the defendant as the law would warrant. (*State v. Ferguson*, 9 Nev. 118; *Commonwealth v. Webster*, 5 Cush. 320; *State v. Ostrander*, 18 Iowa, 458.)

The other portions of the charge objected to, when considered with the portions not objected to, clearly and correctly stated the law applicable to the particular facts of this case. (Wharton's Am. Cr. L., secs. 965-7; 1 Bish. Cr. L., sec. 412; 1 Russ on Crimes, 539-40; Wharton's Law of Homicide, 42-3.)

4. After examining the jurors McClintock, Peers, Fredericks, Francisco, and Wilson, as to their actual state of feeling toward the defendant, and as to all matters from which a bias against the defendant might be inferred, the defendant by his counsel interposed "a challenge to the panel herein upon the ground that the juror McClintock expressed actual bias against the prisoner, and also the jurors Peers, Fredericks, Francisco, and Wilson, expressed themselves in such a manner toward the prisoner as to imply bias upon their part, and that the law permitting said jurors to be of the panel is unconstitutional." It is evident that this cannot be considered as an objection to the panel of jurors. The

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statute provides, that "a challenge to the panel can only be founded on a material departure from the forms prescribed, by statute in respect to the *drawing* and *return* of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn." (1 Comp. L. 1947.)

There is no pretense that the objection to the panel is made upon either of the grounds specified in the statute, nor does it appear that the challenge was in writing specifying plainly and distinctly the facts constituting the grounds of challenge, as required by section 324 of the criminal practice act. (1 Comp. L. 1948.)

A challenge to the panel is not allowed for any of the grounds set forth by counsel, and hence as a challenge to the panel it was properly overruled. A strict construction of the language used would result in the conclusion that the only challenge interposed by counsel was a challenge to the panel. But if it was also intended as a challenge to the individual jurors therein named, then the challenge for implied bias is subject to the further objection made by the attorney-general, that it does not specify any ground of challenge for implied bias as provided by section 340 of the criminal practice act. (1 Comp. L. 1964.) As the jury law of 1875, under which the court acted in impaneling the jury, was unconstitutional, although at the time of the trial of the case it had not been so declared by this court, the proceedings should have been conducted under the law as it existed prior to the passage of the act of 1875. (*State v. McClear*, *ante*, p. 39.) In order, therefore, to have properly presented this question, counsel should have pursued the course adopted in *The State v. McClear*, and challenged the jurors for "having formed or expressed an unqualified opinion or belief that the prisoner was guilty or not guilty of the offense charged," if that was the ground of challenge upon which they relied.

Section 342 of the criminal practice act expressly provides that: "In a challenge for an implied bias, one or more of the causes stated in section 340 must be alleged." (1 Comp. L. 1966.) The statute points out nine distinct causes of challenge for implied bias, and it has been decided

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in this state that the defendant must specify one or more of the particular grounds upon which he bases his challenge. (*State v. Squaires*, 2 Nev. 230.) The same rule prevails in civil cases. (*Estes v. Richardson*, 6 Nev. 128.) And such has been the uniform current of decisions in California under a statute identical with our own. (*People v. Reynolds*, 16 Cal. 130; *People v. Hardin*, 37 Cal. 259; *People v. Dick*, 37 Cal. 279; *People v. Renfrow*, 41 Cal. 38; *People v. McGungill*, 41 Cal. 429.)

But, owing to the peculiar wording of the challenge, and it being evident from the record before us that the court below considered the challenge as having been properly made, and based its decision upon the constitutionality of the act of 1875, we have concluded to waive this preliminary objection, and examine the question upon its merits.

The juror Peers, in his examination, certainly evinced a strong desire to be excused from serving as a juror. He had formed an opinion and expressed it; but it was not an unqualified opinion. His information was derived from "bar-room talk," and he did not know whether any of the persons with whom he conversed about the case were witnesses or not. He was not acquainted with the defendant. He did not entertain any deliberate or fixed opinion or belief as to the guilt or innocence of the defendant. Upon the principles announced by us in *The State v. McClear*, it is clear that the court did not err in overruling the challenge to this juror.

Admitting that the court erred in not appointing triers to try the challenge of actual bias to the juror McClintock, and also erred in overruling the challenge of implied bias to the jurors Wilson, Francisco and Fredericks, what is the result?

The record shows that two of the objectionable jurors, McClintock and Wilson, were peremptorily challenged by the state. As to them it is apparent that the defendant suffered no injury by the erroneous ruling of the court. The jurors Francisco and Frederick were peremptorily challenged by the defendant. Under the law of 1861, as amended in 1865, the defendant was entitled to ten peremp-

tory challenges. (1 Comp. L. 1960.) The court allowed the defendant to exercise twelve peremptory challenges, two more than the law allowed. By this error in his favor the defendant was enabled to get rid of the objectionable jurors and still had the ten peremptory challenges to which he was entitled. He was not required to exhaust any of his peremptory challenges against either of the jurors that were disqualified by law. No substantial right was taken away or impaired. The defendant was not deprived of any of the privileges guaranteed by the common law and secured by the constitution of this state. He had a fair and impartial jury, and this we decided in *The State v. McClear* was the ultimate object to be secured by the constitutional right to challenge a juror for principal cause and to the favor. Is it not, then, perfectly apparent that no injury occurred to defendant by the erroneous ruling of the court?

In *Fleeson v. The Savage Silver Mining Company*, the supreme court of this state said that "the rules governing the impaneling of juries, the introduction of evidence and the general conduct of trials, are but the means by which such right is to be obtained," and that if it appeared "that a departure from them did not defeat or affect the ultimate object of the trial, it would be a mockery of justice to set aside a judgment, otherwise proper and regular, because of such departure." And it was there decided that if a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured; that an injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for the want of another challenge. This general principle, to which we adhere, has been frequently decided in both civil and criminal cases. (3 Nev. 163, and authorities there cited; *People v. Gaunt*, 23 Cal. 156; *People v. Weil*, 40 Cal. 268; *People v. McGungill*, 41 Cal. 429; *State v. Cockman*, 61 N. C. 95.)

5. It is certainly too well settled by the decisions in this state to require any discussion upon the point that this

Argument for Appellant.

court will not reverse a judgment in a criminal case on the ground that the verdict is contrary to the evidence where there is any evidence to support it. (*State v. McGinnis*, 6 Nev. 111; *State v. Ah Tom*, 8 Nev. 214; *State v. Glover*, 10 Nev. 24.)

In this case there was some evidence to sustain the verdict.

The judgment of the district court is affirmed.

11	100
15	256
17	343
30*	1006

11	100
124	293

[No. 775.]

ODD FELLOWS SAVINGS AND COMMERCIAL BANK,
RESPONDENT, v. MILES QUILLEN, COUNTY TREASURER
OF LINCOLN COUNTY, APPELLANT.

STATUTE, WHEN DIRECTORY.—A statute prescribed merely as a matter of form, containing directions which are not of the essence of the thing to be done, but which are given solely with a view to the orderly and prompt conduct of the business, is merely directory.

ACT APPROVED FEBRUARY 17, 1873 (STATS. 1873, 54), CONSTITUTIONAL.—The constitutionality of the act funding the indebtedness of Lincoln county sustained upon the authority of *Youngs v. Hall* (9 Nev. 212).

CONSTRUCTION OF STATUTES.—It is the duty of courts, in construing a statute, to ascertain what the legislature had in view in adopting it, in order to secure, if possible, the object intended to be secured by the statute.

ACT FUNDING THE INDEBTEDNESS OF LINCOLN COUNTY CONSTRUED.—In construing the act of 1873 (Stats. 1873, 54): *Held*, that the legislature intended to, and did, make provision for the payment of the interest on the bonds, regardless of the question whether the financial transactions of the county could be kept on a cash basis or not.

CONSTRUCTION OF STATUTES.—When the various sections of the statute are clear, plain, and unambiguous, the legislature must be understood to mean just what it has explicitly expressed. In such a case there is no room for construction.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

George Goldthwaite, District Attorney of Lincoln County,
and *J. R. Kittrell*, Attorney-General, for Appellant.

I. The act of the legislature entitled, "An Act to consol-

Argument for Appellant.

idate and fund the debt of Lincoln county," is unconstitutional. It is obnoxious to section twenty, article IV, of the constitution of the state of Nevada, which prohibits the passing of local or special laws regulating county and township business. (Dissenting opinion of Chief Justice HAWLEY, in *Youngs v. Hall*, 9 Nev. 225.)

II. The clause of the act requiring the treasurer to detach coupons from the bonds was inserted *ex industria*, and is not directory. (2 Comp. L., sec. 4181; *Corbett v. Bradley*, 7 Nev. 106; *Langenour v. French*, 34 Cal. 99; *Leake v. Blasdell*, 6 Nev. 41; *V. & T. R. R. Co. v. Elliot*, 5 Id. 364; *Cheever v. Hayes*, 3 Cal. 471.)

III. The financial transactions of Lincoln county being by said act placed upon a cash basis, the intention of the legislature was to keep such transactions on a cash basis if possible, and not to strip the county of the means provided to meet its current expenses; and the general fund of said county was not to be subjected to the payment of said coupons as long as there were any legal outstanding claims against said general fund. (2 Comp. L., secs. 4184, 4193-94-97; *McDonald v. Griswold*, 4 Cal. 352.)

Section 9 of the act under consideration says: "In the event the interest fund is insufficient, the treasurer shall draw on the general fund of said county for such purpose."

IV. The legislature only intended that the surplus money over and above the legal outstanding claims against said general fund should be subject to the treasury draft. The auditor of said county must draw his warrant when there is any money in the county treasury to satisfy any allowed, audited and outstanding claims against the general fund. The moneys in said fund are subject to the auditor's warrant, and not to the draft of the treasurer, and only when there are no outstanding legal claims against said general fund, or a surplus over and above the legal outstanding claims against said fund is there any money subject to the treasurer's draft. (2 Comp. L., secs. 3078-9; 1 Nev. 462-3.)

V. By an act of the legislature of the state of Nevada (Stats. 1875, 74), the county commissioners of the several

Argument for Respondent.

counties of the state are authorized and empowered to levy and cause to be collected an *ad valorem* tax for county purposes, not exceeding the sum of one hundred and fifty cents on each one hundred dollars value of all taxable property in the county, etc. "County purposes" means such moneys as are apportioned by the county commissioners and which are not set aside by law into special funds, and comprise the general county, indigent sick, and contingent funds of the county. (Comp. L., sec. 3100.)

It follows, then, that the payment of interest on bonds is not a county purpose, and the using of money in the general fund to pay such interest is not using the money in said fund for county purposes.

VI. The collection of revenues for county purposes is an appropriation for county purposes, and, being such, cannot be used to pay interest coupons as long as there are legal outstanding claims against the general fund. (*McDonald v. Griswold*, 4 Cal. 352; *La Forge v. McGee*, 6 Id. 285, 650.)

VII. If the courts regard section nine of the act under consideration as ambiguous and capable of two constructions, then the construction most beneficial to the public should be adopted. (*Hayden v. Supervisors of Ormsby Co.*, 2 Nev. 371.)

Bishop & Sabin, for Respondent.

I. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents. (*Jackson v. Lewis*, 17 Johns. 475; 13 Johns. 504; *Waterford et al. v. People*, 9 Barb. 161; *People v. N. Y. C. R. R. Co.*, 13 N. Y. (3 Kern.) 78; 25 Barb. 199; Cooley on Const. Lim. 72, 73, 185, 186.)

II. The consideration of the justice or policy of a statute, and its effects upon the general welfare of the state, is addressed to the discretion of the legislature, and having been decided by the legislature, is not a subject of judicial inquiry. (*Billings v. Hall*, 7 Cal. 1; *Youngs v. Hall*, 9 Nev. 212; *State ex rel. Hess v. Washoe Co. Com.*, 6 Nev. 104; *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 435; *People v. Saratoga*

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and *Rens. R. R. Co.*, 15 Wend. 133; *People v. Morrell*, 21 Wend. 576; *Cooley on Const. Lim.* 168–172.)

III. The legislature is the judge whether a general or special law is applicable in a certain case. (*State v. Co. Court of Boone Co.*, 11 Am. Rep. 415; *Evans v. Job*, 8 Nev. 323; *Hess v. Pegg*, 7 Nev. 28; *Clarke v. Irwin*, 5 Nev. 111; *McCauley v. Brooks*, 16 Cal. 11.)

IV. Courts will only declare an act unconstitutional when it violates the constitution clearly, palpably, plainly and in such a manner as to leave no reasonable doubt. (*Stewart v. Supervisors Pope Co.*, 1 Am. Rep. 238; *Cooley on Const. Lim.* 163, sec. 3; 168–171, 181 *et seq.*, and cases there cited.)

V. The coupons sued upon in the action are, by their terms, negotiable, and transferable by delivery. (1 Comp. Laws, secs. 1–3 *et seq.*; 2 Redfield on Railways, sec. 239 *et seq.* and case cited; *Craig v. City of Vicksburg*, 31 Miss. 216; *White v. V. & M. R. R. Co.*, 21 How. 575; *Delafield v. State of Ill.*, 21 Hill, 176; *Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Brainard v. N. Y. & H. R. R. Co.*, 25 N. Y. 496.)

VI. The provision of the statute requiring the treasurer to detach the coupons, is merely directory. (*Cooley on Const. Lim.* 74–78; *Corbett v. Bradley*, 7 Nev. 108; *Rex v. Locksdale*, 1 Burr, 447; *Marchant v. Longworthy*, 6 Hill, 646; affirmed in 3 Denio, 526; *Striker v. Keely*, 7 Hill, 9–24; *People v. Supervisors of Ulster*, 34 N. Y. 268; *Hardman v. Bowen*, 39 N. Y. 196; *Sears v. Burnham*, 17 N. Y. 448; *People v. Peck*, 11 Wend. 612; *Jackson v. Young*, 5 Cow. 269.)

Robert M. Clarke, for Respondent, orally argued this cause.

By the Court, HAWLEY, C. J.:

On the fifth day of January, A. D. 1876, respondent presented to appellant certain interest coupons issued under the act entitled, "An act to consolidate and pay the indebtedness of Lincoln county" (Stat. 1873, 54), and demanded payment of the amount due thereon. Appellant refused to pay the same, whereupon the respondent applied for and obtained from the district court of said county a peremptory writ of mandamus directing appellant to transfer the money

then in the general fund, to the interest fund of said county, to be applied to the payment of said coupons as provided by section nine of said act.

This appeal is taken from that order.

It appears that the money in the interest fund is insufficient to pay the coupons; that if the money in the general fund is transferred to the interest fund it will pay the amount due on said coupons; that at the date aforesaid the legal, allowed, audited and outstanding claims against the general fund of said county were largely in excess of the amount of money then in the general fund; that prior to the presentation of said coupons they were detached and separated from the bonds with which they were originally issued.

1. It is claimed by appellant that no legal demand was made for the payment of said coupons.

This position is sought to be maintained upon the ground that the coupons were detached from the bonds before being presented to the treasurer for payment. Section five of the act provides as follows: "When any interest shall be paid upon a bond issued under the provisions of this act, the county treasurer shall detach the coupons for the interest then due and paid, and deliver the same to the county auditor taking his receipt therefor, whose duty it shall be to file the same in his office." It is claimed by appellant that this section is mandatory; that it was inserted to prevent fictitious coupons from being presented to the treasurer, and that it prohibits him from paying any coupons not detached by himself. It is not pretended that the coupons presented were fictitious; but on the other hand it is admitted that they are genuine, and that if they had been paid the treasurer could have delivered them to the county auditor as directed in said act. True it is that there was no excuse for the holder of the bonds to detach, or cause to be detached, the coupons before presenting the same to the treasurer, and this was certainly not the safest course to pursue. It is always best to follow the plain provisions of the statute and thereby avoid any question of construction. But the respondent, having disregarded the provision, insists that the

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statute is merely directory, and that inasmuch as no one has been prejudiced it ought not to lose its claim because it did not present the bonds with the coupons attached. We are of opinion that courts have often gone too far in declaring positive provisions of the statute merely directory. This summary mode of dispensing with statutory provisions is often liable to abuse. It is the exercise of a power which trenches so closely upon legislative discretion that it ought never to be resorted to by the courts "except," as was said by Lewis, C. J., in *Corbett v. Bradley*, "when it is clearly manifest that the legislature did not deem a compliance with it material, or unless it appears to have been prescribed simply as matter of form." (7 Nev. 108.)

Judge Cooley in his work on Constitutional Limitations, in discussing this question, says: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the *precise mode indicated*, it may still be sufficient if that which is done accomplishes the substantial purpose of the statute." (Cooley, Const. Lim. 77, 78, and authorities there cited.)

In determining this question, as well as every other that involves a construction of the statute, we must carry into effect the intention the legislature had in view in adopting it, in order to secure, if possible, the object intended to be secured by the statute. It will be observed that no negative words are used which forbid the detaching of the coupons from the bonds by any other person than the treasurer. We think it is clear that the legislature, in adopting the provision, inserted the clause requiring the treasurer to detach the coupons as a mere matter of form. The real object to be accomplished was the surrender of the coupons and the delivery of the same to the auditor, to be by him filed as provided in said act, and it was immaterial by whose hands they were detached. The act of detaching the coupons from the bonds was not of the substance of the law. Upon this

ground, sanctioned as it is by eminent authors, and approved by numerous judicial decisions, this provision of the act must be considered and treated as directory.

2. It is contended by appellant that the act is obnoxious to sections twenty and twenty-one of article IV of the constitution of this state.

Whatever views we might entertain upon this question if it was *res integra*, need not be here expressed. We think the constitutionality of the act must be sustained upon the authority of *Youngs v. Hall*, 9 Nev. 212.

As the bonds of Lincoln county, from which the coupons were detached, are negotiable, and rights of property therein may have been acquired by the transfer thereof, since the decision in that case was rendered; and as the legislature of 1875, relying upon the correctness of that decision, passed certain acts that would be subject to the same objection, even if we entertained the opinion that *Youngs v. Hall* was erroneous, the consequences of a reversal would unquestionably prove of greater evil than to allow it to remain. In such a case we conceive it to be our duty to adhere to former decisions. The question whether the act impairs the obligation of contracts is not presented by this appeal. That could only be raised by a party holding outstanding warrants against the county which were issued prior to the passage of the act and have not been funded under the provisions of said act.

3. Appellant argues that it was the intention of the legislature to keep the financial transactions of the county on a cash basis if possible, and not to strip the county of the means provided to meet its current expenses; that the holders of the legal outstanding claims against the county had a vested right to all the money in the general fund sufficient to pay their claims, and that the only money subject to the treasurer's draft for the payment of interest is the surplus over and above the legal outstanding claims against said general fund.

The conclusion we have reached after a thorough examination of this case, renders it unnecessary to notice in detail the several points presented by appellant's counsel in sup-

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port of this position. That the object of the legislature in funding the indebtedness of Lincoln county was to place all of its financial transactions upon a cash basis there can be no doubt, for such is the express language of section one of said act. In order to accomplish this purpose, it was, however, evident that some provision would have to be made whereby the then existing and outstanding indebtedness against the county could be secured. As an incentive to induce scrip-holders to fund this indebtedness, it being within the power of the legislature to make such appropriation of the revenues of the county as it deemed proper, the act was passed. It had a double purpose, that of securing the indebtedness and of reducing the financial transactions of the county thereafter to a cash basis. In arriving at the construction to be given to this act, we do not consider the case of *McDonald v. Griswold* (4 Cal. 352), as applicable to this case. There the legislature, in funding the indebtedness of Sacramento county, authorized the levy of a special tax for the gradual extinguishment of said indebtedness, and also authorized the levy of a tax for county purposes. A creditor of the county holding certain warrants that were issued prior to the act, sought to compel the county treasurer to pay his warrants out of the taxes collected for county purposes. The court held that this could not be done; that the tax collected for county purposes "ought to be restricted to the current expenses of the year as an appropriation, leaving the scrip-holders of the county to look for payment to the tax collected for the floating debt." The act under consideration provides that in addition to the ordinary taxes for county purposes, there shall be levied and collected "a special tax, to be called the interest tax," and that the fund derived from this tax shall be applied to the payment of the interest accruing upon said bonds (sec. 8), and then expressly gives further security in plain and unmistakable language as follows: "It shall be the duty of the county treasurer of Lincoln county to make such arrangements for the payment of the interest of said bonds when the same falls due, at least thirty days before the time of payment; and in the event said interest fund is

insufficient, the treasurer shall draw on the general fund of the county for such purpose" (sec. 9).

It may be that the legislature thought that the ordinary taxes for county purposes would be sufficient to keep the financial transactions of the county on a cash basis, and that the interest fund would be sufficient to pay the coupons as they became due. But the legislature made provision for any contingency that might arise by the insufficiency of the interest fund, and authorized the treasurer in the event of such contingency to draw his draft upon the general fund for the payment of the interest; and further provided that if there was not sufficient money in the general fund, then the treasurer was "authorized and required to make such contracts and arrangements as may be necessary for the payment of said interest and for the protection of the credit of the county of Lincoln" (sec. 9), and did not make any provision for keeping the financial transactions of the county on a cash basis if the ordinary taxes for county purposes should prove insufficient, but did provide for incurring an indebtedness by the commissioners not exceeding nine thousand dollars (sec. 17). That the financial transactions of the county have not been kept on a cash basis is probably owing to the fact that the revenues of the county have decreased since the passage of the act, or the legislature may have been mistaken as to the amount necessarily required to keep the machinery of the county government in motion, and therefore committed an error of judgment in limiting the amount of taxes to be levied for the purpose of paying the interest on the bonds and in limiting the amount of indebtedness to be incurred by the commissioners. But it is manifest that the legislature intended to make, and did make, provision for the payment of the interest on the bonds regardless of the question whether the financial transactions of the county could be kept on a cash basis or not. We are told that this construction of the act has produced the effect "of closing hospitals, unbarring prisons and paralyzing justice." This condition of affairs is certainly to be deplored. If there was any ambiguity in the language of the act, or if it was susceptible of two constructions, then

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a construction which would produce such disastrous results, or be of practical inconvenience to the community, would be rejected, and the construction that would prove most beneficial to the public would be adopted. But the legislative body is the supreme law-making power of the state, and as long as it acts within the pale of its constitutional authority, this court is bound by its action; and where the language of the law given is so plain as not to admit of a different construction, we have no other duty to perform than to execute the legislative will. This must be done without any regard to our own views as to the wisdom, justice, policy or effect of the law.

When all its various sections are taken and compared together, we think the language of the act is clear, plain, simple, unambiguous, and susceptible of but one construction. In such a case, the legislature must be understood to mean just what it has plainly and explicitly expressed, and there is nothing left for this court to construe. This general principle has been frequently decided by this court. (*Brown v. Davis*, 1 Nev. 413; *Lewis v. Doran*, 5 Nev. 411; *Virginia and Truckee R. R. Co. v. Commissioners of Lyon County*, 6 Nev. 73; *Hess v. Commissioners of Washoe County*, 6 Nev. 107; *Fitch v. Elko County*, 8 Nev. 274.)

In *Newell v. The People*, in the court of appeals of New York, Johnson, J., said: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning, apparent upon the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case, there is no room for construction. That which the words declare is the meaning of the instrument;

Points decided.

and neither the courts nor legislatures have the right to add or to take away from that meaning." (7 N. Y. 97.)

In *McCluskey v. Cromwell*, Allen, J., said: "It is beyond question the duty of courts, in construing statutes, to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation." (11 N. Y. 601.)

These rules, by which courts have ever been guided in seeking for the intention of the legislature, in the language of Chancellor Kent, "are maxims of sound interpretation, which have been accumulated by the experience and ratified by the approbation of ages." If the construction given to this act has produced, or will produce, the hardships referred to, we are powerless to rectify the evil. Relief must be sought by legislative enactments, not by judicial decisions.

The order appealed from is affirmed.

11 119
15 98

[No. 769.]

THE STATE OF NEVADA, RESPONDENT, v. M. BOROWSKY, RELATOR.

MISDEMEANOR IN OFFICE—PUBLIC ADMINISTRATOR.—Every willful violation of his duty by a public administrator is a misdemeanor, punishable by a fine of not exceeding \$2000 and removal from office.

IDEM—EXPIRATION OF TERM OF OFFICE.—It is a "misdemeanor in office" for a public administrator to embezzle money received *ex officio* after his term of office has expired.

IDEM—DUTY OF PUBLIC OFFICERS.—It is the official duty of every public officer at or after the expiration of his term of office, to pay over to his successor, or other proper recipient, all funds received and held by him in his official capacity, and a refusal to do so, on proper demand, is a violation of his official duty.

JURY OF ELEVEN MEN.—A defendant indicted for a misdemeanor may be tried by a jury of eleven men, if he consents to such a jury, and his consent is not a waiver of a jury trial.

Argument for Relator.

THIS was an original application before the Supreme Court for a writ of *certiorari*.

The facts are stated in the opinion.

Thomas Wren, for Relator.

I. Did the district court have jurisdiction to try this case? It has jurisdiction to try certain misdemeanors punishable by fines exceeding five hundred dollars. Is this one of those cases? If it is not, the district court did not have jurisdiction to try it, and its proceedings are invalid.

The indictment is under a section of the act concerning the office of public administrator. (2 Comp. L., sec. 3029.)

What is a *willful misdemeanor in office*? The section of the statute does not define it. I do not find anywhere in the statute the acts charged in the indictment made criminal, nor do I find that they were criminal at common law.

According to the definition of a crime or public offense, as set forth in the statute (2 Comp. L., sec. 1675), no one is guilty of a crime or public offense unless he does some act the law forbids him to do, to the doing of which is annexed some one of the penalties enumerated in the statute, or omits to do something the law commands him to do, to which is annexed some one of said penalties.

To what act of the public administrator is a penalty annexed? To what omission to do an act commanded by law as public administrator is a penalty annexed? If there is none, then under the statutory definition of a crime or public offense Borowsky is not guilty and the indictment does not charge a crime. The district court only has original jurisdiction of certain misdemeanors. In order to ascertain whether the court has exceeded its jurisdiction by trying a case of which it does not have original jurisdiction this court has to examine the indictment. If it is a case in which the fine does not exceed five hundred dollars, the district court did not have original jurisdiction to try it, and the proceedings of the court should be held invalid. If upon inspection it should be found that no offense is charged, it would be equally fatal to the proceedings.

Argument for Relator.

II. Does this indictment charge a crime or public offense of which the district court has jurisdiction? If the section of the probate act does create an offense, what acts constitute the offense? The section reads: "For any willful misdemeanor in office," etc. Does the indictment charge that Borowsky committed any act, or omitted to do any act, in office? "It is alleged that Borowsky was appointed and qualified as public administrator on the seventh day of May, 1873, and continued in office until the seventeenth day of December, 1874." It is not charged that during this time he was guilty of any breach of duty as public administrator. The offense charged, if it be an offense, is charged to have been committed not as a public administrator, not in office, but several months after he had retired from office, *i. e.*, on the second day of March, 1875.

III. The court did not have jurisdiction to try Borowsky with a jury of less than twelve jurors. (Const. of Nevada, art. 1, sec. 3; 1 Comp. L., secs. 1679, 1687; Burrill's Law Dict., title "Jury," 231.)

A jury must consist of twelve men; no other number is known to the law. (*Vaughn v. Scade*, 30 Mo. 600; Opinion of Justices, 41 N. H. 550; *Dixon v. Richards*, 3 Miss. (2 How.) 771; *Carpenter v. State*, 5 Miss. (4 How.) 163.)

True, it appears from the record that Borowsky consented to be tried by eleven jurors, but under the provision of the constitution and statutes cited above he could not waive this right.

The court exceeded its jurisdiction in passing sentence upon Borowsky upon a verdict of guilty rendered by a less number than twelve jurors. If the court had jurisdiction to try him with a jury of less than twelve jurors, it had jurisdiction to try him without any jury, notwithstanding the express language of the constitution that "the right of trial by jury shall be secured to all and remain inviolate forever," and that the right to waive it is only granted in civil cases, and the equally plain and emphatic language of the statute that "no person can be punished for a public offense except upon legal conviction in a court having jurisdiction." "No person can be convicted of a public offense, *tried by indict-*

Argument for Respondent.

ment, unless by the verdict of a jury (*i. e.*, twelve jurors) accepted and recorded by the court, or upon a plea of guilty," etc.

J. R. Kittrell, Attorney-General, for Respondent.

I. The mere fact that section 3029 of the compiled laws reads that "public administrators may be tried by indictment," implies that the trial must be had in the district court; for no other court in the state is competent to try a cause on indictment. The words "willful misdemeanor in office," must be construed to mean, and can mean nothing else, *willful misconduct during the incumbent's official term*, and such misconduct is, by the section of the statute itself, made a misdemeanor, punishable by fine not to exceed two thousand dollars, and removal from office.

It is generally the case that the misconduct of officials is covered up during their official terms, and remains undiscovered until after their official functions cease. Therefore, that clause of the statute relative to "*removal from office*," can cut no figure in any prosecution or proceeding of a criminal nature against a public administrator who has violated the law and abused his trust, if his term of office has expired. But I submit that it is competent at any time after the expiration of his term, provided the statute of limitations has not run, for the proper authorities to proceed against him criminally for any misconduct or misdemeanor of which he has been guilty *during the time he was in office*.

II. Had the court the power to try him under the indictment? or, in other words, had the court below jurisdiction to try this case? We think it had.

District courts have jurisdiction to try all misdemeanors punishable by fine in excess of five hundred dollars; and this being punishable, and having been punished by a fine of two thousand dollars, it cannot be disputed but what the district court had jurisdiction to try it, and only that court had the jurisdiction. Jurisdiction is the power to hear and determine; this is its general definition. Jurisdiction, as applied to a particular claim, case or controversy, is the power to hear and determine that controversy.

III. The only question which can be inquired into on *certiorari*, is whether the inferior tribunal had jurisdiction to do the act sought to be reviewed. (*C. P. R. Co. v. Board of Eq., Placer Co.*, 43 Cal. 365; 5 Nev. 317; 6 Nev. 95, 100; *Burnett v. Wallace*, 43 Cal. 25.)

I claim that the question respecting the trial of petitioner by eleven men as jurors, is not a matter touching the *jurisdiction* of the court below in any manner whatever; that what occurred during the trial of the case was merely an incident, in nowise affecting the subject of jurisdiction. The trial of the case with eleven jurors, and the judgment of the court pronounced on their verdict, were simply *irregularities* or mistakes of law committed in conducting the trial which the court had jurisdiction and authority to hold. Such irregularities or mistakes made by a court in the exercise of an admitted jurisdiction are not to be considered on a writ of review. (43 Cal. 367; 46 Cal. 79.)

By the Court, BEATTY, J.:

A writ of *certiorari* was issued out of this court upon petition of Borowsky, commanding the sixth district court to certify its proceedings in the case of the *State of Nevada v. M. Borowsky*. The petitioner was indicted by the grand jury of Eureka county for a misdemeanor in the office of public administrator. He pleaded not guilty; was tried, by his own consent, by a jury of eleven men; was convicted and sentenced to pay a fine of two thousand dollars, and to be imprisoned till the fine was paid, at the rate of one day's imprisonment for each two dollars of the fine.

As there is no appeal in this class of cases from the judgment of the district court, nor other plain, speedy and adequate remedy for an illegal conviction, there is no doubt that the petitioner is entitled in this proceeding to have the judgment against him annulled or modified if the district court has exceeded its jurisdiction; and he claims that it did exceed its jurisdiction in two ways:

First. In trying and convicting him upon an indictment which charges no offense, and therefore, of course, no offense of which the district court could have jurisdiction; and,

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Second. In adjudging him guilty and imposing sentence without the verdict of a legal jury.

The indictment is founded upon the following provision of the law concerning public administrators: "For any willful misdemeanor in office, any public administrator may be indicted, tried, and, if found guilty, fined in any sum not exceeding two thousand dollars, and removed from office." (Comp. L., sec. 3029.)

It shows that Borowsky was the lawful incumbent of the office of public administrator of Eureka county from May, 1873, to December, 1874; that in January, 1874, he received, by virtue of his office, three thousand dollars and upwards of property and moneys belonging to the estate of Adam Hamilton, deceased, and that in March, 1875, "he did willfully, unlawfully, and corruptly appropriate to his own use of the moneys of said estate * * * two thousand one hundred and ninety-nine dollars and nineteen cents, and did then and afterwards willfully and unlawfully refuse to pay over said moneys upon the order of the district court.

The argument in behalf of the petitioner is that the statute upon which this indictment is founded does not define any offense, and, if it does, that the indictment does not charge the offense defined by the statute. To support the first proposition he says: A misdemeanor is a crime, and a crime is defined to be an act or omission forbidden by law and to which is annexed, on conviction, some definite penalty. (Comp. L., sec. 1675.) But there is no act or omission of a public administrator to which any penalty has been affixed by law, and consequently there is no such thing as a misdemeanor in that office. The fault of this argument, I think, consists in attributing to the word misdemeanor, as used in the statute, its technical sense of a species of crime. It is evident, I think, that it is used in its more comprehensive sense of misbehavior, misconduct, violation of duty; for otherwise the word "willful," by which it is qualified, becomes entirely superfluous. Every crime is necessarily willful, but misconduct, or violation of duty, is not. Taken in the latter sense, the word misdemeanor is properly qualified by the word willful; in the former signification, the

expression involves the worst sort of tautology. Besides, in the one case, the whole provision becomes utterly meaningless, while in the other the construction is plain and sensible. The statute makes a willful misdemeanor (in its popular sense of misconduct), a technical misdemeanor or crime by attaching the penalties of fine and removal from office. Its object was not to impose additional penalties in the case of misdemeanors already defined, but to make that criminal which before had not been so, by the ordinary form of attaching a penalty, and thereby forbidding it. Every willful violation of his official duty by a public administrator is, therefore, a misdemeanor, punishable by a fine of not exceeding two thousand dollars and removal from office. Of such offenses, it is not questioned that the district court has jurisdiction.

But does this indictment charge the offense defined by the statute? Petitioner argues that it does not, because it shows that his term of office had expired before the misappropriation of the money, and therefore it could not have been a *misdemeanor in office*. That the statute is intended only to apply to those who are incumbents of the office at the time of the commission of the offense he contends is proved not only by its language, but by the fact that one of the prescribed penalties is removal from office, which of course cannot be imposed upon one whose term has expired. I think, however, the argument is inconclusive. The language of the act is, "may be fined, etc., and removed from office." The latter part of the penalty of course could not be enforced if the incumbency of the office had expired before conviction, but that is no reason why the fine should not be imposed. If Borowsky, after the expiration of his term, had been indicted for embezzling money before its expiration, it would scarcely have been argued that the statute did not apply merely because he could not be removed from office. And yet the reason assigned would go as far to sustain that proposition as the other. This shows that, if the argument proves anything, it proves too much, and consequently that it proves nothing. The question, however, still remains upon the language of the act,

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Is it a "misdemeanor in office" to embezzle money received *ex officio* after the term of the officer has expired? To my mind it seems clear that it is. It is one of the official duties of every public officer at or after the expiration of his term of office to pay over to his successor or other proper recipient all funds received and held by him in his official capacity, and a refusal to do so, on proper demand being made, is a violation of his official duty. The indictment in this case shows such a refusal, and charges it to have been willful. It therefore comes fully up to the statute, if "willful misdemeanor in office" means, as it clearly does, nothing more nor less than willful violation of official duty. This view is strengthened by the consideration that a public administrator is an officer who virtually continues in office an indefinite period after the nominal expiration of his term. His official duty is simply to administer upon estates, in which he is entitled to administration, according to law. (Comp. L., sec. 3025.) After his term expires he simply ceases to be entitled to take out letters of administration in new cases, but he continues to administer, or at least he continues officially chargeable in respect to the estates in which he has received letters, until he is regularly discharged by the district court. Until he is so discharged it is always his duty as an officer to pay over moneys on the order of the court (Comp. L., sec. 3027), and embezzlement of the money of an estate is such misconduct as authorizes the district court summarily to suspend his functions. (Comp. L., sec. 763.)

My conclusion, in view of these provisions, is, that the indictment does charge the petitioner with an offense within the jurisdiction of the district court.

The remaining question is, Did the court exceed its jurisdiction in pronouncing sentence upon the verdict of eleven jurors, the petitioner having consented to be tried by that number?

There is no doubt that he was entitled to be tried by a jury of twelve if he had demanded it. The question is whether his consent to be tried by eleven could authorize the court to pronounce sentence upon their verdict. If, as

his counsel argues, the verdict of eleven is the same thing as no verdict at all, it would seem to follow that the court exceeded its authority, for in that case an agreement by the defendant to be tried by eleven jurors would be equivalent to waiving a jury trial, and it seems to be implied in the language of the constitution (art. 1, sec. 3) and expressly enacted in the law (Comp. L., secs. 1679, 1687) that on the trial of an indictment a jury cannot be waived. There is certainly much apparent and perhaps real force in the argument that a trial by eleven jurors is no jury trial, but there is very strong authority for holding the defendant estopped in a case like this from saying that it is not, and in my opinion it ought to be so held if there is any reasonable ground for such a decision. To hold otherwise would seem to involve the conclusion that if a verdict of guilty does not convict, a verdict of not guilty does not acquit, and that in the latter case the defendant might be tried again perhaps after his witnesses had gone beyond his reach, and in a case perhaps where the very reason of his waiving a full panel of jurors was to prevent a postponement of his trial and the loss of important testimony. These considerations, it is true, do not meet the argument, but they indicate the unjust and harsh consequences involved in the position contended for and the motives which may legitimately actuate a court in inclining to an opposite conclusion.

The conclusion reached by this court in *The State v. McClear*, decided during the last term, is that the right of trial by jury means the right to be tried by twelve *impartial* jurors. That they should be impartial is just as essential to the constitution of the jury as that they should be twelve in number, and there is no principle upon which a defendant can be held capable of waiving the disqualification of a juror for bias, which will not include the power of consenting to a smaller number than twelve. Yet it has been held in numerous cases in other states, and in the *Case of Anderson* (4 Nev. 265), in this state, that the defendant is bound by his waiver of that objection. And where a juror has been properly challenged for cause, and the challenge erroneously overruled and the juror sworn, the error

Points decided.

seems to be cured by the refusal of the defendant to renew his challenge when offered the privilege by the court. (*Gardiner v. People*, 6 Parker Cr. R. 195.) These authorities have a bearing upon the question, but there are others more directly in point. The case of the *Commonwealth v. Dailey* (12 Cush. 80), was decided by Chief Justice Shaw, and is directly in point, to the effect that a defendant indicted for a misdemeanor may be tried by eleven jurors if he consents, and that such consent is not a waiver of a jury trial. The reasons given in the opinion and the authorities cited, fully sustain the decision. (See also 1 Metc. (Ky.) 365; 2 Id. 1; 2 Paine C. C. 578; 28 Ga. 576.)

The case of *Cancemi v. The People* (18 N. Y. 128), is opposed to the decision of Chief Justice Shaw, in Massachusetts, and is followed and approved in *Hill v. The People*, in Michigan (16 Mich. 354). But both of these were cases of murder, and the weight of authority seems to be that, in prosecutions for misdemeanors at least, the court may, by the defendant's consent, proceed to try him with less than the full number of jurors. I am satisfied that in so deciding there is no injustice done in this case, nor risk of injustice in others. It rests with the defendant to protect himself by insisting upon his right, or by simply not waiving it.

The proceedings under review should be affirmed, and it is so ordered.

[No. 758.]

STATE OF NEVADA EX REL. JOSEPH ROSENSTOCK,
RELATOR, v. S. T. SWIFT, RESPONDENT.

CONSTITUTIONALITY OF THE ACT INCORPORATING CARSON CITY.—The act incorporating Carson city (Stats. 1875, 87), is not in conflict with article III, or sections 1 or 8 of article V, or section 10 of article XV of the constitution.

IDEM—APPOINTING POWER.—Under the constitution of this state, the naming in the act of incorporation of the persons who were to constitute the provisional or initiatory board of trustees was not the exercise of a power intrinsically executive. *Clarke v. Irwin* (5 Nev. 111), affirmed.

IDEM—COUNTY OFFICERS EX OFFICIO CITY OFFICERS.—The legislature, in

11 128
18 420
4* 741
18 491
4* 742
19 296
9* 886

11 128
21 525
34* 873
11 128
23 474
11 128
24 263

Statement of Facts.

incorporating Carson city, had the power to constitute the designated county officers city officers, and to impose upon them the executive or ministerial duties of the municipality, corresponding to their respective duties as county officers.

MUNICIPAL CORPORATION.—A municipal corporation, in this state, is but the creature of the legislature, and derives its powers, rights and franchises from legislative enactment or statutory implication.

OFFICERS OF MUNICIPAL CORPORATION.—The officers of a municipal corporation are created by the legislature, and are chosen or appointed in the mode prescribed by the law of its creation.

IDEM—CITY RECORDER.—The provision of the act creating the office of city recorder has no reference to the jurisdiction of justices of the peace. The offices are distinct, though under the act of incorporation both offices may be held by the same person.

SECTION THREE OF ARTICLE ELEVEN OF THE CONSTITUTION CONSTRUED.—The provisions of section 3 of article XI of the constitution providing that all fines collected under the penal laws of the state shall be pledged to educational purposes, has no application to fines recoverable for violations of city ordinances, but applies to fines recoverable under the general laws of the state.

SECTION TWENTY-ONE OF ARTICLE FOUR OF THE CONSTITUTION.—The act incorporating Carson city is not in violation of the provisions of section twenty-one of article four of the Constitution, which declares, "Where a general law can be made applicable all laws shall be general, * * * throughout the State." *Evans v. Job* (8 Nev. 323), affirmed.

MUNICIPAL CORPORATION CREATED BY SPECIAL LAW.—Section one of article eight of the constitution clearly recognizes the authority of the legislature to create municipal corporations by special enactment. This interpretation is not inconsistent with the provisions of section eight of the same article. *City of Virginia v. The Chollar-Potosi G. & S. M. Co.* (2 Nev. 86), affirmed.

POWERS OF A MUNICIPAL CORPORATION.—A municipal corporation possesses and can exercise such powers only as are expressly conferred by the law of its creation, or such as are necessary to the exercise of its corporate powers, the performance of its corporate duties and the accomplishment of the purposes for which it was created.

PART OF A STATUTE UNCONSTITUTIONAL.—When part of a statute is unconstitutional it will not authorize the court to declare the remainder void unless all the provisions are connected in subject-matter depending on each other.

THIS was an original proceeding in the Supreme Court in the nature of a writ of *quo warranto* to determine the right of S. T. Swift, sheriff of Ormsby county, to hold and exercise the office of marshal of Carson city, under the act of the legislature approved February 25, 1875, incorporating said city.

Argument for Relator.

Robert M. Clarke, for Relator.

I. The act of the legislature to incorporate Carson city is unconstitutional for the reason that it appoints the officers of the city. (Stats. 1875, 88, sec. 4.) The power to appoint to office is an executive power. (Const. art. 5, sec. 1-8; Const. art. 15, sec. 10; 4 Abbott's Pr. 35; 1 Cranch, 137; *State v. Kennon et al.*, 7 Ohio State, 347.) Article III of the Constitution forbids the legislature to exercise it. (Art. III, Const. Nev.)

II. The act constitutes the county officers *ex officio* city officers, and thus permanently deprives the citizens of the state residing within the municipal subdivision of a fundamental right, to wit: the right of local self-government. (Const. art. 2, sec. 1; Const. art. 4, sec. 32; Cooley's Const. Lim. 34, 35; 55 New York, 55.) To permit the people of the entire county to choose the officers of Carson city, is as gross a denial of self-government as to permit the people of the entire state to choose the officers of Ormsby county.

III. The act is unconstitutional in this. It is a special law regulating the jurisdiction of justices of the peace. (Const. art. 4, sec. 20.) It confers additional and exceptional powers and duties upon the justice of Carson township.

IV. The act is unconstitutional in this: It diverts penal fines from the school fund. (Art. 11, Const., sec. 3.)

V. The act is unconstitutional in this: It is a special law in a case where a general law exists, and can be made applicable. (Act Feb. 21, 1873, laws 1873, 66-74, in Const. Nev., art. 4, sec. 21; *Evans v. Job*, 8 Nev. 322; *Ex parte Pritz*, 9 Iowa, 35, 36; *Town of McGregor v. Baylis*, 19 Id. 47-48.) The general law exists, and is in force. (Laws 1873, 66.) Carson city was organized under it when the act was passed.

VI. The act is unconstitutional in this: It imposes no restrictions upon the powers of taxation, assessment, borrowing money or loaning credit, whereas, the constitution, in terms, requires this to be done. (Const., art. 8, sec. 8; Stats. 1875, 90, 91, 96; Cooley Const. Lim. 39, 40; Dil-

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lon Munic. Corp., sec. 27, 134; *Foster v. City of Kenosha*, 12 Wis. 616; *Rogan v. City of Watertown*, 30 Id. 264-65; *Brunson v. Mayor of Albany*, 24 Barb. 495; *Bank of Rome v. Village of Mosell*, 18 N. Y. 41.) The power to borrow money, etc., exists under art. 8, sec. 8, Const.; 30 Wisconsin, 264, 265.

VII. The act is unconstitutional in this: It is a special law for the organization of a city, the constitution requiring all such laws to be general. (Const. Nev., art. 8, sec. 8; Const. Ohio, art. 13, sec. 1-2-6; 20 Ohio St. R. 34-35, 36, 37; Const. Iowa, art. 8, sec. 1; 9 Iowa, 30, 32-33; 19 Id. 43, 46; Const. Kansas, art. 12, sec. 5; 4 Kansas, 141-42-43-47-48; 9 Id. 695-96; *City of Virginia v. Chollar-Potosi Co.*, 2 Nev. 86-89, 90-91.)

It is a rule of construction, that the whole constitution may be examined with a view to arriving at the true meaning of any part. (Cooley's Const. Lim. 57-58; Broom's Maxims, 521.) It is also a rule of construction, that effect is to be given, if possible, to the whole instrument and to every section and clause. If different portions seem to conflict, the court must harmonize them. (Cooley Const. Lim. 57-58; 24 Cal. 539.) To apply the foregoing rules of construction to the case in hand. As we have seen the necessary effect of section 8, article 8, of the state constitution is to forbid the incorporation of towns and cities by special laws. To require a thing to be done by general laws, is to forbid it to be done by special law. (See cases cited in support of point VII.) To hold that section one authorizes the organization of cities and towns by special laws, is to give to the section an interpretation inconsistent with, and destructive of section eight; is in effect to say, that section eight requires towns and cities to be organized by "general" laws, and that section one permits them to be organized by "special" laws, which is contradictory and absurd.

To harmonize sections one and eight, and give to each effect, it is only necessary to interpret each according to the ordinary import of the words employed, and the manifest spirit of the whole instrument.

Section eight requires towns and cities to be organized

Argument for Respondent.

under general laws, section one permits special legislation relating to, or concerning the powers of, municipal corporations which were organized and existing at the adoption of the constitution.

Ellis & King, for Respondent.

I. The doctrine of local self-government, as applied to a municipal corporation created under our state constitution, cannot be found in our state constitution. The people have no natural right of voting. A legislative office may be created and filled.

The constitution must in terms, or by necessary implication at least, limit the power of the legislature in this, as well as in all other matters, otherwise the legislature has the power to do that which has been done in this case. (Smith's Com. secs. 179-80; 5 Nev. 125-7; Id 293-4; *Bull v. Snodgrass*, 4 Nev. 524; Const. N. Y. 162.)

II. The constitution of Nevada only provides a general system of filling vacancies, giving to the governor special powers in certain cases, and recognizing that the laws may provide also for filling certain vacancies. Here if there was a vacancy it was provided for by law (*Clark v. Irwin*, 5 Nev. 111), and the filling of such vacancy was only temporary and provisional. (Smith's Com. secs. 179-80.) The legislature has unlimited power in any matter of legislation unless specifically limited. (*Gibson v. Mason*, 5 Nev. 286, 293, 299, 300; *Ash v. Parkinson*, 5 Id. 15; *Evans v. Job*, 8 Nev. 337-9; 7 Nev. 30.)

III. The act does not confer jurisdiction upon any justice of the peace; that remains intact under the general laws, but is mere *descriptio personæ*, and simply designates who shall be recorder.

IV. The provisions of art. 2, sec. 3, of the constitution of Nevada, apply solely to fines recoverable under general laws, regulating fines for misdemeanors, and apply uniformly to the whole state, and not to fines for the violation of city ordinances.

V. Under art. 8, secs. 1 and 8 of the constitution of this state, a corporation for municipal purposes may be created by special act. (Cal. Const.; 5 Nev. 124; *Chollar*

Potosi v. Virginia City, 2 Nev. 87; *Hess v. Pegg*, 7 Id. 23; *Evans v. Job*, 8 Id. 322; *Clarke v. Irwin*, 5 Id. 111.) But this is a general law as contra-distinguished from a special law. Smith's Com., secs. 802-4; *People v. Potter*, 35 Cal. 115; 3 N. H. 321; 17 Id. 547; 12 Pick. 344; 9 Greenl. 56; 5 Id. 511; 5 Mass. 268; 29 Ind. 409; *Young v. Hall*, 9 Nev.; Const. N. Y.; *U. S. Trust Co. v. Brady*, 20 Barb. 119; *People v. Bowen*, 21 N. Y. 517.)

VI. An assessment for grading a street in the town is not a tax within the meaning of article 8, section 8, and restricted by the act. (Laws 1875, p. 90, sec. 10, clause 2; 28 Cal. 355, *et seq.*, and pp. 361, 367, 372.) And limitation is omitted from the act; the responsibility is upon the legislature, and is not a matter for judicial correction. (Id. 367; 18 N. Y. 42; *Bank of Rome v. Village of Rome*, 26 N. Y. 69-70.) A license is not a tax, and the imposition of a license is not taxation within the meaning of article 8, section 8, of the Const. (34 Cal. 448-9; 4 Cal. 46; 1 Cal. 252-54; *Anderson v. Doll*, 27 Cal. 607; *Attorney-General v. Squires*, 14 Cal. 12.) But there is a limitation upon the power of taxation, properly so called, and upon the powers of the board contracting indebtedness, borrowing money or loaning credit. (Laws 1875, 90, secs. 10 and 31.) Money cannot be borrowed nor credit loaned without incurring indebtedness. (*Mason v. Gibson*, 5 Nev. 300.)

VII. But if there is no limitation, as claimed, and there is no power to levy assessments, still the act is valid and complete, and useful in other respects, and must stand so far as the information is concerned. (34 Cal. 457; 17 Id. 554; 18 Id. 68; 22 Id. 663; 5 Nev. 131; 8 Id. 342, and cases cited; 3 Id. 180; 32 Md. 369; 31 How. Pr. 289, 343; *People v. Rochester*, 50 N. Y. 553.)

By the Court, EARLL, J.:

This is a complaint or information by the attorney-general of this state, in the nature of a *quo warranto*, instituted at the relation of Joseph Rosenstock, to determine the right of the respondent to hold and exercise the office of marshal of Carson city. The respondent demurred to the complaint

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or information on the general ground that it does not state facts sufficient to constitute a cause of action; hence the facts stated therein are to be taken as admitted.

The questions presented involve the validity of the act entitled "An act to incorporate Carson city," approved February 25, 1875. (Stats. 1875, 87.) It is contended by the relator that the act is in contravention of several provisions of the constitution of this state, and is, therefore, totally void.

The first objection urged against the validity of the act is that the legislature had no power to appoint, in the act of incorporation, the board of trustees who were to organize the city government and to conduct the affairs thereof for the first year, as provided by section four of the act, which is as follows: "The board of trustees for the first year shall consist of Henry F. Rice and A. B. Driesbach, representing the first ward; David A. Bender and William H. Corbett, representing the second ward; and Jacob Klien, from the city at large, whose duty it shall be, upon the first Monday in March, eighteen hundred and seventy-five, to assemble at the court-house in Carson city, take the oath of office as such trustees, and hold their first meeting as a board of trustees. Before entering upon any other business, the trustees above named, representing the first ward, shall determine their several terms of office by lot; and as so determined, the one trustee shall continue in office until the first Monday in May, A. D. eighteen hundred and seventy-six, and until his successor is duly qualified; and the other of said trustees shall hold his office as such until the first Monday in May, eighteen hundred and seventy-seven, and until his successor is duly qualified; and the other two trustees, hereinbefore named as representing the second ward, shall then and there, in like manner, determine by lot, their several terms of office, and shall, as so determined, hold in all respects as the trustees of the first ward. The board shall then elect one of their number, who shall be the president of the board of trustees until the first annual election taking place under the provisions of this act, and the board

shall then proceed generally upon their duties." (Stat. 1875, 88.)

It is argued that the power of appointment to office is, in its nature, an executive function, and therefore the naming, in the above-quoted section of the act, the persons who were to constitute the trustees for the first year, was in violation of article three, and sections one and eight of article five, and section ten of article fifteen of the constitution of this state, which are as follows:

"Article 3. The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive, and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in cases herein expressly directed or permitted.

"Article 5, section 1. The supreme executive power of the state shall be vested in a chief magistrate, who shall be governor of the state of Nevada.

"Sec. 8. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the next election and qualification of the person elected to such office."

"Article 15, section 10. All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."

Of these provisions of the constitution, section 8 of article 5, alone confers any appointing power upon the executive department of the government, and that only so far as to authorize the governor to temporarily fill vacancies occurring in existing offices, when no other mode for filling such vacancies has been provided by the constitution and laws.

The constitution nowhere designates what officers shall be provided for incorporated cities, nor does it declare whether municipal officers shall be elected or appointed, and if there is any restriction on the power of the legislature over such officers it must be found elsewhere than in

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the provisions of the constitution above quoted. But there is nowhere in the constitution any express provision on the subject, hence if such limitation of the legislative power, as is here contended for exists, it must be found in some manifest implication.

It is, however, argued on behalf of the relator, that the appointing power is in its nature and essence executive, and inherent in the executive department independent of any express provision of the constitution, and *Marbury v. Madison*, 1 Cranch, 137; *Achley's Case*, 4 Abbott's Pr. 35, and *The State ex rel. Attorney-General v. Kennon*, 7 Ohio St. 546, are cited in support of this position. The only authority above cited which, in our opinion, tends to support the position of relator is the case cited from 4 Abbott's Pr. 35. In that case Davies, J., says: "The exercise of the power of appointment to office is a purely executive act, and when the authority has been exercised, it is final, for the term of the appointee." The authorities cited in support of this opinion are the ninth section of the amended charter of the city of New York in which it was provided, "that no committee or member of the common council shall perform any executive business whatever, except such as is or shall be especially imposed on them by the laws of this State, and except that the board of aldermen may approve or reject the nominations made to them as hereafter provided;" from which the learned judge inferred that the legislature regarded the power to make appointments to office as the exercise of executive authority; and also, the following quoted from *Marbury v. Madison*, 1 Cranch, 137, *supra*: "When he (the president) has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But, as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by law, and are not resumable

by the president. They cannot be extinguished by executive authority." Judge Davies, after quoting the above, says: "It is perfectly apparent, therefore, that the exercise of the power of appointment to office is not a legislative act." It may be conceded that the exercise of the power of appointment to office is not strictly a legislative act, yet it does not necessarily follow that it is the exercise of a purely executive function. It is very clear that there is nothing in the opinion of Chief Justice Marshall (from which the above was quoted by Judge Davies) from which it can be implied that the appointing power is inherent in the executive department of the government. The opinion was based upon the positive provisions of the Constitution of the United States conferring the power on the president; but the chief justice nowhere characterizes the appointment to office as the exercise of an executive power, but on the contrary, declares it to be a political power, which, under the Constitution of the United States is to be exercised by the President. (See opinion, 159, 167.) Cooley, under the head of "legislative encroachments upon executive power," says: "If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of many duties which they may provide by law, they may refer either to the chief executive of the state, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty." (Const. Lim. 114, 115.)

It is true, the line of distinction between the legislative and executive powers of the government, in respect to appointments to office, is not always so clearly drawn as to be free from doubt. It depends upon the form of government to which it is to be applied. What would come within the legislative power, in our form of government, would fall within the executive in another, and *vice versa*. The question here presented is, whether, under the constitution of

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this state, the naming in the act of incorporation of the persons who were to constitute the provisional or initiatory board of trustees, was the exercise of a power intrinsically executive. This precise question was presented, and, as we think, correctly decided by this court in the case of *Clarke v. Irwin* (5 Nev. 111). In that case, the court, by Whitman, J., referring to the case of *The State ex rel. Attorney-General v. Kennon*, *supra* (7 Ohio St. 456), (also cited by the relator in that case), say: "The decision in that case is probably correct; but it is based upon a constitutional provision unlike any to be found in the constitution of the state of Nevada. By such provision the appointing power was expressly taken away from the legislature and given to the governor, as the recital of the clause will clearly show;" * * * and that to use the language of one of the judges, "appointing power by the general assembly is thus cut up by the roots, except only in the special cases, in which it is expressly given by the constitution itself. In the constitution of the state of Nevada, the appointing power of the legislature is neither cut up by the roots, nor in any manner hampered, save where the constitution itself, or the federal constitution, provides for filling a vacancy. The former prescribes the mode of filling vacancies only as to state officers and members of the legislature; the latter, as to United States senators and representatives in congress. In every other case the power is in the legislature, to be by it regulated by law, as is evident from the fact that no provision is made save as to vacancies; and as to these, the following is used:" * * * (Const. Nev., Art. V., Sec. 8.) "Two things must then concur: there must be a vacancy, and no provision made by the constitution, or no existent law for filling the same before the governor can exercise the appointing power. Now if upon the creation of this new office, because it is such, as the office of sheriff of White Pine county had no existence until the passage of the law creating the county, no vacancy occurred, the office remained to be filled by some power. The governor had not that power, and there was no prohibition upon the legislature, unless it exist in the constitutional provisions

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heretofore considered, and it has been seen that there it cannot be clearly found, as applicable to a case similar to the present; wherefore the office could be properly filled by the legislature.”

This seems to us to be a correct exposition of the constitutional provisions involved, and is fully sustained by judicial decisions of other states in whose constitutions similar provisions are found. (*Davis v. The State*, 7 Md., 151; *Mayor &c. of Balt. v. State, ex. rel. The Board of Police of Balt.*, 15 Md., 376; *People v. Bennett*, 54 Barb., 481; *The People v. Hurlbut*, 24 Mich., 44.)

The next objection is that the act is unconstitutional because it constitutes certain county officers *ex officio* city officers. By the eleventh section of the act the treasurer of Ormsby county is constituted *ex officio* city treasurer; by the twelfth section the assessor of the county is constituted *ex officio* the city assessor; by the thirteenth section the district attorney of the county is constituted *ex officio* the city attorney; by the fourteenth section the sheriff is constituted *ex officio* the city marshal; and by the fifteenth section the county clerk is constituted *ex officio* the city clerk.

It is difficult to distinguish the principle involved in this objection from the one just considered, and if our conclusion is correct in respect to the power of the legislature to make the provisional or initiatory appointments therein referred to, it follows that it had the power to constitute the designated county officers city officers, and to impose upon them the executive or ministerial duties of the municipality corresponding to their respective duties as county officers. The duties imposed upon them as city officers are of the same character as those which they are respectively required to perform as county officers, and there is no constitutional inhibition against the exercise of the duties of a municipal office by a person holding a county office, when the duties of each are of the same character. But it is claimed that the legislature, by conferring these city offices upon the county officers, have “permanently deprived the citizens of the state, residing within the municipal subdivision, of a fundamental right: the right of local self-government.”

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The existence of a fundamental right of municipal local self-government, is necessarily dependent upon some constitutional grant or manifest implication, neither of which can be found in the constitution of this state. Hence, a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication. Its officers or agents, who administer its affairs, are created by the legislature, and chosen or appointed in the mode prescribed by the law of its creation. (*People v. Coon et al.*, 25 Cal. 649; *Giovanni Herzo v. San Francisco*, 33 Cal. 134; *Payne et al. v. Treadway*, 16 Cal. 220.) Nevertheless, the principle of local self-government has always been recognized, to a certain extent, by the legislature of this state in the passage of statutes creating and providing for the government of municipal corporations, and the selection of officers and agents to administer the affairs of such corporations has generally been intrusted to the electors of the respective municipalities, or their appointment committed to the authorities thereof; and it cannot, with propriety, be said that the legislature have wholly disregarded this principle in the passage of the act under consideration, because by section 3 of the act the entire government of the city is vested in a board of trustees, to consist of five members, who are required to "be actual residents and owners of real estate in the city, and to be chosen by the qualified electors thereof."

The third objection to the constitutional validity of the act is: "It is a special law regulating the jurisdiction of justices of the peace."

This objection is directed to the sixteenth section of the act, by which a recorder's court is created for the city, and the justice of the peace of Carson township is constituted "*ex officio* the city recorder, with the like jurisdiction as commonly conferred upon recorder's courts in municipal corporations, subject to appeals taken to the district court as from justices of the peace." It is quite apparent that this provision of the act has no reference whatever to the jurisdiction of justices of the peace. The offices of justice

of the peace and of city recorder are distinct offices, though, under the act of incorporation, both offices may be held by the same person; and there being no constitutional inhibition against the exercise of both by the same person, we are unable to perceive any force in the objection. (*Merrill v. Gorham*, 6 Cal. 41; *People v. Edwards et al.* 9 Cal. 286; *People v. Durick*, 20 Id. 94.)

The fourth objection urged against the validity of the act is: "It diverts penal fines from the school fund."

By the eighteenth section of the act it is provided: "All taxes, fines, forfeitures, or other moneys collected or recovered by any officer or person, under or by virtue of the provisions of this act, or of any valid ordinance of the city, shall be paid by the officer or person collecting or receiving the same to the city treasurer. * * * All such moneys shall be placed by the city treasurer in a fund to be known as the general fund, and shall be so kept except as paid out upon proper warrants. * * *" It is argued on behalf of relator that the act in this respect is in violation of that part of section three of article eleven which declares: "All fines collected under the penal laws of the state * * * shall be, and the same are, hereby solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses." The answer to this is, that this clause of the constitution has no application to fines recoverable for violations of city ordinances, but applies solely to fines recoverable under the general laws of the state. There is a broad distinction between the penal laws of the state and penalties prescribed by the ordinances of municipal corporations, and this provision of the constitution manifestly means such fines only as are collected under the penal laws prescribed by the law-making power of the state, and cannot, by any legal or constitutional rule of construction, extend to penalties incurred for violation of the ordinances of municipal corporations.

The fifth objection is that the law is void because "it is a special law in a case where a general law exists and can be made applicable;" and it is therefore contended that the act was passed in violation of that clause of the twenty-first section of article 4 of the constitution, which declares: "Where

a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." The argument in support of this proposition is that, inasmuch as a general law existed at the time of the passage of the act in question (Stat. 1873, 66) providing for the government of cities and towns, and the town of Carson having been organized under its provisions, it is, therefore, practically demonstrated that a general law can be made applicable. The principle involved in this proposition cannot be distinguished from that decided in *Hess v. Pegg*, 7 Nev. 23, and also in that of *Evans v. Job*, 8 Nev. 323. The same argument was urged against the validity of the acts respectively involved in those cases, and the same authorities cited in support thereof as are presented here; there was an elaborate opinion in each case in which all the authorities cited by counsel for the relator, as well as others bearing upon the subject, were fully reviewed, the result of which is an exposition of this provision of the constitution adverse to the position of relator, and the principle thus decided must now be regarded as the settled law of this state.

There is, however, another clause of the constitution which, in our opinion, clearly recognizes the authority of the legislature to create municipal corporations by special enactment. We refer to section one of article eight, which provides that "the legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes; but corporations may be formed under general laws; and all such laws may, from time to time, be altered or repealed." It is true, counsel for relator contends that this interpretation of the section is inconsistent with, and in violation of, section eight of the same article, which reads as follows: "The legislature shall provide for the organization of cities and towns by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, except for procuring supplies of water." It is argued that the two sections can be harmonized only upon the theory that section eight requires all towns and cities to be organized under general laws, while section one merely "permits

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special legislation relating to, or concerning the powers of municipal corporations which were organized and existing at the adoption of the constitution." This interpretation of counsel for relator is opposed, not only by judicial decisions, but by the practice of the state ever since the adoption of the constitution, and in our opinion, cannot be sustained upon any established principle of constitutional interpretation. . In this country, the creation of corporations, whether private or municipal, is the exercise of legislative power, and until comparatively a recent period, both kinds of corporations were created singly, by special acts of legislation. It, therefore, follows that the authority of the legislature to create corporations by special laws is limited only by the express or necessarily implied restrictions of the constitution. We are, therefore, of opinion that it was not the design of the framers of the constitution, by these provisions, to restrict the power of the legislature, except in respect to corporations other than municipal. "The people, in framing the constitution, committed to the legislature the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden." (*People v. Draper*, 15 N. Y. 543; see also *Bank of Chenango v. Brown*, 26 N. Y. 469.) There is nothing in all this in anywise in conflict with the authorities cited in support of the position of relator. The decisions cited from the reports of Ohio, Kansas, and Iowa, are all based upon constitutional provisions, which in this respect are entirely unlike the constitution of this state.

The decisions of Ohio and Kansas rest upon the same constitutional provisions, which are as follows: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." (Const. Ohio, article 13, sections 1 and 2; Const. Kansas, article 12, section 5.) The courts of those states

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hold that the restriction in these provisions apply to public as well as private corporations, and there can be no question as to the correctness of those decisions as applied by the courts of those states, but they are not applicable to the constitution of this state because municipal corporations are expressly excepted from the operation of the restriction. Also by the thirtieth section of the third article of the constitution of Iowa, the legislature of that state is expressly prohibited from passing "local or special laws. * * For the incorporation of cities and towns;" and by section one of article eight of the same constitution, it is provided as follows: "No corporation shall be created by special laws, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided." The exception in this clause refers to the establishment of a state bank and its branches. It will thus be seen that the legislatures of those states are, by the positive provisions of their respective constitutions expressly prohibited from creating either municipal or private corporations except by general laws.

The only other authority cited by counsel in support of this proposition is the case of the *City of Virginia v. The Chollar Potosi G. & S. M. Co.*, 2 Nev. 86, decided by this court in 1866, and in which the precise question under consideration was presented and decided, but instead of sustaining the argument urged on behalf of relator is, in our opinion, a complete answer thereto. The action was brought to recover municipal taxes alleged to be due from the defendant to the city of Virginia for taxes on the products of mines.

The defense was that the act of 1865, granting to the city a new charter under which the tax in question was levied, was in conflict with section 8, of article 8, of the constitution, and was, therefore, void. Beatty, J., in delivering the opinion of the court, after some general observations in respect to the object and meaning of section 8, says: "But there is another section of the constitution, to-wit: section 1, of article 8, which we think settles this question. That section reads as follows: 'The legislature shall pass no special act in any manner relating to corporate powers, ex-

cept for municipal purposes, but corporations may be formed under general laws, and all such laws may, from time to time be altered or repealed.' The expression 'in any manner relating to corporate powers' is a rather ambiguous phrase, but we think the framers of the constitution meant by that language to prohibit the *formation of corporations by special acts*. The subsequent language, 'but incorporations may be formed under general laws,' shows that was the meaning intended to be conveyed. Then to use more appropriate language the section would read in this way: 'The legislature shall pass general laws for the formation of corporations, but no corporations (except corporations for municipal purposes) shall be created by special act.' This we think is what the constitution meant to express."

We entertain no doubt of the correctness of this exposition of these constitutional provisions. Both sections originated in the constitution of the state of New York, adopted in 1846, and have since been substantially incorporated into the constitutions of Wisconsin, Michigan and California, and perhaps some other states, in all of which, so far as we have been able to ascertain, the power of the legislature to create municipal corporations by special acts is conceded, and only denied in those states where the provisions of section 8 have been adopted in connection with a clause expressly inhibiting the legislature from passing such special acts.

This disposes of every objection urged against the constitutional validity of the act except that which arises upon the clause of section 8, of article 8 of the constitution, which requires the legislature to impose restrictions upon municipal corporations in respect to their "powers of taxation, assessment, borrowing money, or loaning their credit."

This provision of the constitution evidently imposes a duty upon the legislature in respect to the subjects specified, but it does not direct when or how it shall be exercised; nor does it prescribe the character or measure of the restriction which shall be imposed. It therefore follows, that the legislature alone has the power to determine the

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mode and measure of the restriction. Judge Dillon, referring to this constitutional provision, says: "This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers, but in what the restrictions shall consist, and how they shall be imposed, are subjects left to the discretion or sense of duty of the legislative departments, with the exercise of which the courts cannot interfere." (1 Dillon on Municipal Corporations, section 27.) Judge Cooly, referring to the same subject, says: "Whether, in any case, a charter of incorporation could be held void on the ground that it conferred unlimited powers of taxation, is a question that could not well arise, as a charter is probably never granted which does not impose some restrictions; and when that is the case, it must be inferred that those were all the restrictions the legislature deemed important, and that therefore the constitutional duty of the legislature has been performed." (Cooly on Const. Lim. 518. See also *Hill v. Higdon*, 5 Ohio St. 248; *Maloy v. Marietta*, 11 Id. 636-8; 13 Mich. 481; *Bank of Rome v. Rome*, 18 N. Y. 38; *Benson v. Mayor, etc., of Albany*, 24 Barb. 248; *Clark v. Rochester*, Id. 446.) But whether the proposition last above quoted is a correct exposition of this provision of the constitution or not, we do not feel called upon to decide in this case, since it is clear that a limitation is imposed in respect to each of the enumerated subjects by the act in question. By the second subdivision of section 10, it is provided: "They (the board of trustees) shall annually levy a tax of not less than one-quarter of one per cent., nor exceeding one per cent., upon the assessed value of all real and personal property situate in the city and made taxable by law for state and county purposes." And by the third subdivision of the same section, the power of assessment conferred for the improvement and repair of streets and sidewalks is limited to the cost of such improvements and repairs, and required to be assessed against the owner or owners of the property in front of which the improvement or repair is made; and by the thirty-first section it is provided that "No debt shall be created directly or indirectly against the city beyond the

amount of current revenues of the city; nor shall any contract for supplies of water or gas, or other supplies for the city, or any other contract whatever made on behalf of the city, be of any validity for any period exceeding one year." It will thus be seen that the legislature was not unmindful of the duty enjoined by the constitutional provision referred to, nor did they evade its performance by the passage of the act in question. It is true, there is no express restriction upon the power of the corporation to loan its credit; but no such restriction was required, because the power is nowhere granted by the act. It is a well-settled principle of law that a municipal corporation possesses and can exercise such powers only as are expressly conferred by the law of its creation, or such as are necessary to the exercise of its corporate powers, the performance of its corporate duties, and the accomplishment of the purposes for which it was created. (1 Dill. on Mun. Corp., section 55, and authorities cited.)

The question whether the failure on the part of the legislature to impose restrictions upon the power of the corporation in respect to fixing and collecting a license tax, conferred by the eighth subdivision of the tenth section, is not necessarily involved in the decision of this case, and it is, therefore, wholly unnecessary to discuss it. If that provision of the act is entirely invalid, it in no respect impairs the general operation and effect of the act. It is not sufficient for the relator to show that some particular provision of the act is not warranted by the constitution. "It is well settled that when a part of a statute is unconstitutional, that will not authorize the court to declare the remainder of the statute void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed one without the other." (*Evans v. Job*, *supra*, 342.)

It is apparent that the main general purposes of the act are not dependent upon the validity of the provision referred

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to, nor is the right of respondent to exercise the office of city marshal in any manner affected thereby.

We are, therefore, of opinion that the act in question is constitutional, and that respondent is entitled to exercise the office of marshal of said city. It is, therefore, ordered that the information be dismissed.

[No. 779.]

THE STATE OF NEVADA, RESPONDENT, v. JAMES L.
JOHNSON, APPELLANT.

JURY LAW OF 1875 UNCONSTITUTIONAL.—This case was reversed upon the authority of *The State v. McClear*, ante, declaring that the jury law as amended by the act approved March 2, 1875, was unconstitutional and void.

APPEAL from the District Court of the Fifth Judicial District, Lander County.

The facts are stated in the opinion.

M. S. Bonnifield, for Appellant.

J. R. Kittrell, Attorney-General, for Respondent.

By the Court, EARLL, J.:

The defendant was indicted by the grand jury of Lander county for the crime of murder; and the trial jury were impaneled under the provisions of the act entitled "An act to amend 'an act to regulate proceedings in criminal cases in the courts of justice of the territory of Nevada,' approved November twenty-sixth, eighteen hundred and sixty-one," approved March 2, 1875.

During the progress of impaneling the trial jurors, nine of the jurors drawn, in answer to questions propounded, said, in substance and effect: "I have formed and expressed an unqualified opinion as to the guilt or innocence of the defendant."

Thereupon, the defendant challenged each of said jurors, on the ground that they had respectively formed and ex-

Points decided.

pressed an unqualified opinion as to his, defendant's guilt. The court denied the respective challenges, and defendant duly excepted.

There is nothing in the record of this case to distinguish it from that of the *State v. McClear*, decided at the January term of this court, and upon the authority of the decision in that case, the judgment must be reversed.

The judgment is, therefore, reversed, and the cause remanded for a new trial.

[No. 732.]

A GAUDETTE, RESPONDENT, v. W. S. TRAVIS,
APPELLANT.

REMARKS OF THE COURT NOT EXCEPTED TO.—Defendant claimed that the remarks made by the judge, in connection with his ruling upon a certain point, were erroneous: *Held*, That in order to present the question to this court it must appear that the remarks were excepted to at the time. By failing to make any objection, proceeding with the trial, and taking his chances of a verdict, the defendant waived the exception.

IDEM—ERROR—WHEN NOT IRREMEDIAL.—If the ruling of the court is correct, the fact that a bad reason is given, will not, in general, be treated as an error, because it was uttered in the presence of the jury, and never ought to be deemed an irremediable error. The remedy of the party against whom the remarks are made, is by asking the court to give an instruction containing a correct statement of the rule or principle of law involved.

POSSESSION AND DELIVERY OF PERSONAL PROPERTY.—A delivery of personal property is nothing except a voluntary transfer of the possession from one person to another.

IDEM—SYMBOLICAL DELIVERY NOT REQUIRED.—Formal or symbolical acts are sometimes admitted *ex necessitate* to be sufficient to constitute a delivery, but they are not required when the substantial thing has been done, of which they are merely a sign.

IDEM.—INSTRUCTIONS.—If the defendant desired to have the jury consider the question of delivery it was his duty to have prepared, and asked the court to give, an instruction upon the point.

MODIFICATIONS OF INSTRUCTIONS.—The court is authorized to modify and change an instruction offered by counsel, even if correct as an abstract proposition of law, when it is calculated to mislead the jury.

CHARGE OF THE JUDGE UPON THE FACTS.—An instruction of the Court, assuming as a fact that A. was a creditor of B., where this was a fact in issue in the case, was clearly erroneous.

11 149
11 184
12 86
13 153
14 414
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30* 831
19 41
5* 668

Argument for Appellant.

IDEM.—WHEN ERROR NOT PREJUDICIAL.—The evidence being clear that A. was a creditor, and it appearing that if that question had been submitted to the jury as a special issue and they had found otherwise it would have been the duty of the court to set aside the verdict: *Held*, that under such circumstances, the inadvertent assumption of the fact by the court was not such an error as justified a reversal of the case.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

Pitzer & Croyland, for Appellant.

I. The remarks made by the court, while ruling upon the admissibility of the bill of sale, were calculated to mislead the jury and thereby injure the defendant, and the error is sufficient to justify a reversal upon this ground.

II. The first instruction given on behalf of plaintiff is erroneous, because it does not clearly or fairly state the law, in that while attempting to declare the requisite conditions under the statute to render the sale of personal property good against an attaching creditor, it totally omits to state that there must be an immediate delivery to give validity to the sale. If the instruction is thus erroneous it is ground for reversal. (*Richardson v. McNulty*, 24 Cal. 339; *Atwood v. Fricott*, 17 Cal. 37.)

III. Plaintiff's second instruction is erroneous. The court seems to take for granted that the wood had been handled, and the usual acts of ownership had been exercised over it by the plaintiff, which were essential ultimate facts in issue. Upon the evidence attempting to establish those facts, the court had no right to intimate its opinion in the most remote degree. (*Cahoon v. Marshall*, 25 Cal. 197; *Caldwell v. Center*, 30 Cal. 539; *Preston v. Keys*, 23 Cal. 193.)

IV. The court erred in adding extraneous matter to defendant's first instruction, and also by not stating the law correctly. In the addition made, the court does not say that to render valid a sale of personal property against an attaching creditor, that an immediate delivery is required by the statute.

Argument for Respondent.

V. The court erred in adding to appellant's third instruction the words: "However, a debtor has the right to prefer any creditor, and the mere fact of Peter Guertin selling his property to Gaudette is not of itself conclusive evidence of fraud." This instruction is erroneous, because it assumes as proven the important fact which was directly at issue, viz: that Gaudette was an actual *bona fide* creditor of Guertin.

VI. There was no symbolical delivery, and it is not contended that there was a manual delivery, and without a delivery the transaction falls within the rule of the statute, and is conclusive evidence of fraud as against the attaching creditor. (*Lawrence v. Burnham*, 4 Nev. 368.)

A. B. Hunt and George Goldilwaite, for Respondent.

I. The first and second assignments of error are not well taken, for the reason that if any error occurred it was in the admission of the bill of sale in evidence, and not in the reasons which influenced the court in admitting the evidence.

II. The instructions of the court are to be taken as a whole and construed together. And if the law governing the case upon the evidence has been fairly stated to the jury, there is no ground for reversal, although some of the instructions might be subject to verbal criticism.

The rule is, that the whole of each instruction should be considered and not detached or isolated portions thereof, in determining whether there is error in any given instruction; and that all of the instructions shall be considered in determining whether the law governing the case was fairly stated to the jury. (*Brooks v. Crosby*, 22 Cal. 43.) An actual change of possession of personal property is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased, and that the vendee has entered into possession. (*Calhoon v. Marshall et al.*, 25 Cal. 201; *Randall v. Parker*, 3 Sand. 73, cited in 25 Cal. 201.)

Where a vendee takes possession at a time subsequent to the sale, but before the rights of creditors accrue by attach-

Argument for Respondent.

ment or otherwise, he shall hold against such creditors. (*Clute v. Steele*, 6 Nev. 339; see authorities therein cited.)

III. There was no error in the second instruction given for the plaintiff. The court did not, in the most remote degree, intimate its opinion as to any fact or facts in the case, but simply stated the law as laid down by this court in *Conway v. Edwards*, 6 Nev. 190; and also stated that what one can do by himself he can also do by an agent, which is a universal rule. (Story on Agency, sections 2 and 3.)

IV. There was no error in the addition made by the court to defendant's first instruction, for the reason that there was no pretense that the bill of sale conveyed the title to the ranch of Peter Guertin. It was a matter not in issue.

V. There was no error in the addition made by the court to appellant's third instruction. The instruction as asked by appellant referred to actual fraud and not to constructive fraud.

If there was actual fraud in the sale from Guertin to Gaudette, what had possession or delivery to do with the case at all?

A sale of property which is fraudulent *per se*, cannot be rendered valid as against attaching creditors by any delivery or change of possession whatever, no matter when the delivery may have been made, or how continuous has been the change of possession. If the sale was made with the intent to defraud the creditors of Guertin it was void *ab initio*, and delivery or change of the possession had nothing to do with it.

VI. Under the rule as laid down by this court, the delivery and change of possession was complete and ample to satisfy the statute. (*Doak v. Brubaker*, 1 Nev. 218; *Conway v. Edwards*, 6 Nev. 190.)

VII. Where there is any substantial evidence to support the verdict of a jury, or where the law touching the different theories of appellant and respondent was fairly stated, and the jury found for the latter, an appellate court will not set the verdict aside. (*Ophir S. M. Co. v. Carpenter*, 4 Nev. 548; *Blackie v. Cooney*, 8 Nev. 49; *Menzies v. Kennedy*, 9 Nev. 159.)

By the Court, BEATTY, J.:

This action is for the recovery of certain personal property or its value, which was levied upon and sold by the defendant as sheriff of Lincoln county under attachment and execution issued in the case of *Roeder v. Guertin*. The plaintiff claims as vendee of Guertin and the defendant justifies under the attachment and execution upon the two grounds that the sale from Guertin to Gaudette was fraudulent in fact, as being made with intent to hinder, delay, and defraud the creditors of the vendor, and fraudulent in law for want of an immediate delivery, followed by an actual and continued change in the possession of the property sold. The plaintiff had judgment, and the defendant appeals from the judgment, and the order of the court overruling his motion for a new trial upon numerous assignments of error, which will be noticed *seriatim*. The first and second assignments of error are based upon certain remarks made by the court, in the hearing of the jury, in ruling upon the objection of the defendant to the admission in evidence of the bill of sale of the property in controversy from Guertin to the plaintiffs. That bill of sale reads as follows:

"This is to certify that I have this day sold and delivered all my right and interest in a wood ranch, situated eight miles from Pioche, in a westerly direction, to Ambrose Gaudette, for the sum of fifteen hundred dollars, gold coin, and also six hundred cords of wood or more, and one mule, and all my kitchen utensils. May the 8th, 1874.

"PIERRE GUERTIN.

"GEO. GUERTIN, }
"S. H. McINNIS, } Witnesses."

The objection to the admission of this paper was that it was not under seal, and that it purported to be a conveyance of real estate. The remarks made by the court were in effect that it was a mooted question in this state, whether a seal was essential to a conveyance of real estate, and that for his part he was inclined to think it was not. At this

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point, counsel for plaintiff stated that they did not claim that the bill of sale passed the title to the real estate, but that it was a good bill of sale of the personal property. The court thereupon overruled the objection, to which ruling the defendant excepted, but he appears to have taken no exception at the time to the remarks of the court.

It is not contended here that the ruling of the court was erroneous, but it is argued that the remarks made by the judge in connection with his ruling were erroneous and fatally misleading to the jury, so fatally misleading that no subsequent instruction by the court could cure the error. If this was so, the defendant should have excepted to the remarks at the time. By failing to do so, proceeding with the trial, and taking his chances of a verdict, he waived the exception. It is scarcely necessary to cite authority for the proposition, that when in the course of a trial anything occurs that is absolutely fatal to the verdict, unless waived by the party prejudiced, it is held to be waived unless excepted to as soon as it comes to the knowledge of the party entitled to take advantage of it. Besides, the error of the court in this instance, if it was an error, was not irremediable. If the bill of sale had been offered and admitted for the purpose of proving title to the real estate, the error of the court would have been cured, both as regards the ruling and the accompanying remarks, if at a subsequent stage of the trial the judge had said that he was mistaken in the views he had expressed, and had stricken out the evidence. But as the bill of sale is admitted to have been properly received as evidence for the purpose for which it was offered, that is, to prove the sale of the personal property, the defendant could only have been injured by the expression of opinion by the court to the effect that real estate may be conveyed by an instrument not under seal; and if he had any reason to think he would be injured by that remark, it was his privilege and his duty to ask the court to instruct the jury correctly on the point. In fact, this is precisely what he did, and the court, at his request, gave the jury an explicit instruction in writing, that no title to the so-called ranch passed by means of the bill of sale. There

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can be no doubt that this instruction effectually cured whatever error may have been committed in the remarks complained of. We have had occasion recently (*State v. Samuel Watkins*) to commend the practice by *nisi prius* judges of giving pertinent explanations of the grounds of their rulings upon questions arising in the course of the trial of causes.

In the hurry of such trials where rulings must be made off hand, without much advice, or any opportunity for deliberation, it must often happen that the judge will let fall erroneous or inaccurate expressions of opinion upon the legal questions involved; but these remarks are not addressed to the jury, and are not presumed to influence them. If the ruling of the court upon the point at issue is correct, the fact that he has given a bad reason for the ruling will not, in general, be treated as error because it was uttered in the presence of the jury; and certainly it ought never to be deemed an irremediable error. As has been said, such remarks are not addressed to the jury, and they are not bound to give any heed to them. On the other hand, they are bound by the written instructions of the court, and by them only. This they are presumed to know, and if there is any reason to apprehend that they do not know it, an instruction to that effect may always be prayed by either party, and would undoubtedly always be allowed. It follows, therefore, that where the court, in the course of the trial, has casually misstated a rule or principle of law, which one of the litigants has reason to fear members of the jury may recollect and act upon to his prejudice, he has a complete remedy in his hands by asking the court for a correct statement of the rule or principle, in the solemn and authentic shape of a written instruction, which the jury will be bound, under the sanction of their oaths, to obey. Thus it appears, that for two reasons there is nothing in the error assigned of which the appellant is entitled to complain; for in the first place he waived all objection to the remarks of the court by failing to except at the time; and, in the second place, any error that the court may have committed, was cured by the instruction given at his request.

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The third assignment of error is abandoned in the argument.

The fourth assignment is, that the court erred in giving the first instruction asked by plaintiff. That instruction reads as follows: "You are instructed, that if you believe, from the evidence, that A. Gaudette, the plaintiff in this action, purchased the personal property named in the complaint in this action, in good faith, for a valuable consideration, and without fraud on his part, and that the said Gaudette took into his possession the said property, either in person or by his agent, and continued in possession of the same from the time of the alleged sale by Peter Guertin to Ambrose Gaudette, up to the time the same was attached in the suit of *John Roeder v. Peter Guertin*, then you will find for the plaintiff. But if you believe from the evidence that the plaintiff, Ambrose Gaudette, perpetrated a fraud in making the purchase of said property of Peter Guertin in order to defraud the creditors of Peter Guertin, or that he colluded with Peter Guertin in the perpetration of such fraud, then you will find for the defendant." This instruction is alleged to be erroneous for two reasons: First. Because in enumerating the circumstances necessary to make the sale valid against creditors, it omits the "immediate delivery" required by the statute; and, second, because in stating that the defendant is entitled to recover in case the plaintiff has been guilty of actual fraud, it is implied that he is entitled to recover only in that case, whereas he was entitled to recover if there was a failure to deliver the property and change the possession. In order fully to appreciate the scope of these objections, it is necessary to consider the evidence in regard to the sale and delivery of the property in controversy, and this will present an opportunity of disposing at the same time of the ninth and tenth assignments of error which are based upon the alleged insufficiency of the evidence to show any delivery or change of possession of the property.

The following facts were established by uncontradicted testimony: the plaintiff was a creditor of Guertin to the extent of fifteen hundred dollars, and to satisfy the indebtedness

Guertin agreed to make the sale of the property described in the bill of sale. The bargain was concluded on the ranch where the personal property was, on the eighth day of May, 1874. The parties, vendor and vendee, then went to the house of McInnis, one of the witnesses to the bill of sale, distant two hundred yards, or thereabouts, from where the wood lay scattered on the hillside, where it had been cut, and got him, McInnis, to draw the bill of sale, because they did not sufficiently understand the English language. After the execution of the bill of sale, Guertin told Gaudette he could take possession as soon as he pleased, and that night, or next morning, both parties left the ranch and went together to Pioche. Plaintiff having, in the meantime, hired George Guertin, cousin of Pierre, to haul the wood, from the hillside to the roadside and cord it there, where wagons could reach it.

George Guertin, the man so hired, had worked on the ranch before, cutting wood, but had been absent from it for several months before the sale. On the ninth of May he commenced hauling and cording the wood, and so continued until the attachment was served on the fourteenth. The vendor, Pierre Guertin, never returned to the ranch after the morning of the ninth of May. This is substantially all the testimony, and there is no conflict in it.

There is no doubt that it shows an actual change of possession of the wood, which is the only portion of the property in controversy in this action, and as that change was from the vendor to the vendee, and with the vendor's consent, there was necessarily a delivery; for a delivery of personal property is nothing except a voluntary transfer of the possession from one to another. The appellant contends that it was essential, in order to effect a delivery, that the parties should have gone upon the ground where the wood lay, and there have done something symbolical of delivery. But this proposition does not appear to be sustained by the authorities referred to. It has been held that a symbolical delivery will be sufficient in some cases to effect a change of possession of bulky articles, not capable of manual tradition; but it has never been held that an actual and voluntary

transfer of the possession of personal property was insufficient to protect the vendee against creditors of the vendor, merely because it had not been preceded by some formal act symbolical of delivery.

The statute of frauds has been interpreted by reference to its object, which is to require the vendee of personal property to so change its *status* as to advertise the change of ownership. The principal thing to be done in this view is to change the possession and keep it changed. Formal or symbolical acts are sometimes admitted *ex necessitate* to be sufficient to constitute a delivery, but they are not required when the substantial thing has been done of which they are merely a sign. This disposes of the objection to the testimony. As to the instruction, the hypothetical case stated—a *bona fide* purchase for a valuable consideration, and immediate and continuous possession of the property by the vendee—embraces every element of a valid sale and delivery; for under such circumstances the consent of the vendor to the possession of the vendee is necessarily implied, and voluntary transfer of possession, as has been said, is delivery.

The other objection to the instruction: that in stating one ground upon which the defendant might recover, it excluded all other grounds, has some apparent force; for there is a sort of implication from the language used, that the defendant could only recover in case actual fraud had been shown. But on the other hand, it may be said, that in its positive terms, the instruction was correct as far as it went, and the omission complained of might have been justified upon the ground that the proof of change of possession was so clear, and so entirely uncontradicted, that a finding for defendant, on that point, was impossible. The ground, however, upon which the action of the court is most clearly sustainable is, that the defendant should have asked an instruction himself upon the question of delivery, if he wished the jury to consider it. This he did, and the court allowed his instruction in the language in which it was prayed. So that in fact the omission complained of did not occur.

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The fifth assignment of error is based upon the allowance of plaintiff's second instruction, as follows: "A large quantity of cord-wood is not capable of easy manual delivery, and a person purchasing such personal property may take possession of the same, or any part thereof, without moving it, by any proper acts of ownership, such as handling it; cording it; snaking it, or executing the usual acts of ownership of the same, and anything of this kind which may be done by a purchaser *in person* may be done by an agent. * * *" It is not contended that this instruction contains anything which is not law; but appellant complains that it conveys to the jury an intimation that the acts mentioned in it have been proved. Such, however, is not its import. It merely states that certain acts amount to possession, and leaves the jury to decide whether such acts have been proved.

The sixth and seventh assignments of error are based upon additions made by the court to instructions asked by the defendant. The first instruction, as prayed, was as follows: "You are instructed that possessory claims to real estate can only be conveyed by deed, and the paper admitted in evidence, purporting to be a bill of sale, did not pass any title to the so-called ranch of Peter Guertin, to the plaintiff in this action."

Before allowing this instruction, the court appended the following words: "But such bill of sale might be sufficient to pass the title to the personal property therein mentioned, provided the sale was made in good faith for a valuable consideration, and there was a delivery of the possession of the personal property from Pierre Guertin to Ambrose Gaudette." It is said that this addition was irrelevant; but manifestly it was not. The instruction, as asked, declared the effect of the bill of sale with reference to a purpose for which it had not been offered or admitted in evidence. Its only effect, conceding its correctness as an abstract proposition, would have been to mislead the jury. To prevent that consequence, the addition was necessary, and therefore, of course, not erroneous, unless, as appellant claims, it misstated the law. But it did not, even by implication,

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misstate the law as applicable to the testimony in the case. It is true the statute requires an *immediate* delivery, and the addition to the instruction omits that qualification. But the omission was justified by the fact that the proof of change of possession, which was ample, was all of an immediate change; that is, of a change commencing the morning after the sale, and lasting four days before the creditors of the vendor commenced proceedings; and in any view this was an immediate delivery. (See *Clute v. Steele*, 6 Nev. 335.) It would have been worse than useless to submit to the jury the question whether the delivery was *immediate* or not, when if they found a delivery at all, they could have found none other than an immediate delivery.

The next instruction to which the court made an addition was asked in the following form: "You are instructed that if you find from the evidence that Peter Guertin made said alleged sale to plaintiff with intent to hinder, delay, or defraud the creditors of said Peter Guertin, and that said plaintiff knew that such was the intent, then such sale was absolutely void as to the creditors of said Guertin, and you must find for defendant without regard to consideration paid or delivery." To which the court in allowing it added the following words: "However, a debtor has the right to prefer any creditor, and the mere fact of Peter Guertin selling his property to A. Gaudette is not of itself conclusive evidence of fraud." Appellant contends that the court erred in not adding the following words also in immediate connection with the foregoing: "if accompanied by immediate delivery and followed by a continued change of possession." It is very clear, however, that such a qualification was not requisite, or even appropriate. The instruction as asked related solely to the question of actual fraud, and it would have been improper in modifying it to mix up the question of statutory or constructive fraud which was covered by other instructions given in the case. It cannot be expected that each separate instruction will cover every legal proposition involved in a case. It is sufficient if each as a substantive proposition is correct and applicable to the testimony.

Points decided.

Another objection to the words added by the court is that they assume as a fact that Gaudette was a creditor of Guertin, and convey to the jury a distinct intimation of the opinion of the court upon one of the most important of the facts in issue in the case. This objection appears to be well founded. The plain import of the words used by the court is that Gaudette was a creditor, and such an intimation of opinion was clearly a violation of section 12, article 6, of the constitution, and amounts to error. But it does not necessarily follow that the judgment should, therefore, be reversed. The evidence was full and uncontradicted that Gaudette was a creditor. If that question had been submitted to the jury as a special issue, and they had found otherwise, no court would have hesitated to set aside the verdict. Under such circumstances, the inadvertent assumption of the facts by the court was natural and excusable, and it is well settled that such an error is not ground for reversal. (5 Nev. 78; 1 Graham & Waterman on New Trials, 301; 2 Id. 634; 33 Cal. 299; 18 Id. 376; 17 Id. 573; 13 Id. 427.)

The eighth assignment of error is not relied on, and the ninth and tenth have been disposed of in connection with the fourth.

The judgment and order appealed from are affirmed.

[No. 756.]

WELLS, FARGO & CO., APPELLANTS, v. R. P. DAYTON,
RESPONDENT.

WHEN INJUNCTION WILL NOT ISSUE TO RESTRAIN COLLECTION OF TAXES.—No court of equity will allow its injunction to issue to restrain the collection of a tax, except when actually necessary to protect the rights of citizens who have no plain, speedy and adequate remedy at law.

IDEM.—Before an injunction will be granted, it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, if the property is real estate, throw a cloud upon the title of complainant, or there must be some allegation of fraud.

IDEM—INSOLVENCY OF ASSESSOR.—The mere allegation of the insolvency of the assessor is not sufficient to authorize the court to grant an injunction to restrain the collection of a tax.

Argument for Respondent.

IDEM—PAYMENT OF TAX—REMEDY AT LAW.—*Held*, that the complainant in this case had an adequate remedy at law. If the taxes are paid under protest and the county received the money, it could have brought its action against the county, and if the tax was illegal, could have recovered the money back.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

Ellis & King, for appellant.

I. Injunction in a case of this character is a recognized remedy, and indeed the only remedy to prevent irreparable injury. To prevent a multiplicity of suits—a sale of the property to sundry purchasers and its conversion upon a tax unlawful in toto—it is alleged that the assessor and collector are unable to respond in damages. (15 Wallace, 317, 318; Hilliard on Taxation, 469, § 74; *State v. Atkins*, 35 Ga. 315; *Masterson v. Hoyt*, 55 Barb. 520; *Indianapolis v. Gilmore*, 30 Ind. 414; *Vanover v. Davis*, 27 Ga. 354; *Olmstead v. Board of Supervisors*, 24 Iowa, 33; 18 Md. 284; 29 Penn. 121; Hilliard, secs. 78, 81, 86, 96, 99, 100; 15 Wis. 11.)

A. B. Hunt, also for Appellant.

I. A court of equity will restrain by injunction a tax illegally levied. (*Burnett v. Cincinnati*, 3 Ohio, 88; *Ottawa v. Walker*, 21 Ill. 605; *Adams v. Castle*, 30 Conn. 404.)

George Goldthwaite, for Respondent.

I. If the tax of which appellant complains is illegal, which is the only question before the court, the respondent is a trespasser. (*Ritter v. Patch*, 12 Cal. 299; *Susquehanna Bank v. Supervisors of Broome County*, 25 N. Y. 314, 315.)

II. If the respondent is a trespasser, appellant has a complete remedy at law. (*Leach v. Day*, 27 Cal. 645; *Ritter v. Patch*, 12 Cal. 299.)

III. Conceding tax illegal, it does not necessarily follow that appellant is entitled to injunction. (*Sav. Loan Society v. Austin*, 46 Cal. 488, 489.)

IV. This is not a case for equity to interfere, as the wrong complained of may be fully compensated in damages,

Argument for Respondent.

which can be easily ascertained, and it is not shown that a judgment at law cannot be satisfied by execution. (*Conley v. Chedic*, 6 Nev. 224.)

V. While the complaint attempts to set up irreparable damages, there is not sufficient in the facts stated to satisfy the court that the apprehension of such injury is well-founded. (*Branch Turnpike Co. v. Board of Supervisors Yuba Co.* 13 Cal. 190; *Dewitt v. Hays*, 2 Cal. 463.)

VI. The complaint of appellant confesses that the proceedings of respondent are legal, and does not allege that his bondsmen are unable to respond in damages, and fails to show wherein appellant is injured, or that he has not a remedy at law. (*Merrill v. Gorham*, 6 Cal. 41; *Leach v. Day*, 27 Cal. 27; *Phelps v. Peabody*, 7 Cal. 30; *Dewitt v. Hays*, 2 Cal. 463.)

T. W. W. Davies, also for Respondent.

I. If the proceedings complained of are void, equity of course will not interfere. And irregularities or errors occurring in the assessment of a tax, or in the execution of the powers conferred upon taxing officers, present no sufficient case for equitable interposition—the remedy at law being adequate and sufficient. (*Dana v. Chicago*, 11 Wall. N. J. 108; *Heyward v. Buffalo*, 14 N. Y. 534; *Warden v. Supervisors*, 14 Wis. 618; *Kellogg v. Oskosh*, Id. 623; *Brewer v. Springfield*, 97 Mass. 152; *O'Neal v. Maryland and Virginia Bridge Co.*, 18 Md. 1; *Clinton School District Case*, 56 Penn. St. 317; *C. & W. R. Co. v. Black*, 32 Ind. 471, *Green v. Mumford*, 5 R. I. 472; *Jones v. Sumner*, 27 Ind. 512; *C. B. & Q. R. R. Co. v. Fray*, 22 Ill. 34; *Merritt et al. v. Farris*, Id. 303; *Munson v. Minor*, Id. 601; *Exchange Bank v. Hines*, 3 Ohio St. 37.)

II. This is a suit against the defendant as the county assessor of Lincoln county, who is a bonded officer; the bond required being not less than five thousand dollars, and it is nowhere alleged that the sureties on the assessor's bond are insolvent, or not fully able to answer in money to the extent of the alleged damage. (*Exchange Bank v. Hines*, 3 Ohio St. 37; *De Witt et al. v. Hays*, 2 Cal. 463; *Cowell v.*

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Doub, 12 Id. 273; *Ritter v. Patch*, Id. 298; *Turnpike Co. v. Supervisors*, 13 Id. 190; *Kelsey v. Trustees of Nevada*, 18 Id. 629; *Leach v. Day*, 27 Id. 645; *Terry v. Jackson*, 4 John. Ch. 352; 6 Johnson's Chancery, 19; 2 Dallas, 405; 9 Gill & John. 408.)

III. If the assessment is unequal and unjust, relief will be afforded by the board of equalization; and if illegal, the injured party has his action at law against the offending officer as a trespasser, and his bondsmen. (*Macklot v. City of Davenport*, 17 Iowa, 385; *Warden et al. v. Supervisors*, 14 Wis. 618; *Merrill v. Gorham*, 6 Cal. 41; *Fall v. City of Marysville*, 19 Id. 393; *Guy v. Washburn*, 23 Id. 113; *People v. Arguello*, 37 Id. 524; *Exchange Bank v. Hines*, 3 Ohio St. 37; *Thompson v. Com. Can. Fund*, 2 Abb. Pr. R. 347; *Hasbrouck v. K. Board of Health*, 3 Keyes N. Y. 484; *M. L. Ins. Co. v. Supervisors*, Id. 182; *Mesick v. Supervisors*, 50 Barb. 191; *Mayor of Brooklyn v. Meserole*, 26 Wend. 138; *Van Dorn v. Mayor of New York*, 9 Paige Ch. 387; *Wilson v. Mayor of New York*, 4 E. D. Smith, 673; *Chem. Bank v. Mayor of New York*, 1 Abb. Pr. R. 80; *N. Y. L. Ins. Co. v. New York*, Id. 250; *Livingston v. Hollenbeck*, 4 Barb. 16; *Van Rensalaer v. Kidd*, 4 Id. 18; *Thatcher v. Dusenberry*, 9 How. Pr. R. 33; *Thompson on Prov. Rem.* 250; 1 Van Santvoord's Eq. Pr. 347.)

By the Court, HAWLEY, C. J.:

The complainant filed a bill in equity to enjoin the collection of a tax alleging, that complainant is a non-resident of the State of Nevada; that defendant is county assessor of Lincoln county; that as such assessor he assessed the office furniture and fixtures of complainant at the sum of \$700, and "money secured by mortgage" at \$40,636.58; that the different parcels of real estate mortgaged were assessed at more than the full value regardless of the mortgages held by complainant; that said mortgages are of record in the recorder's office of Lincoln county; that complainant offered and tendered to defendant as county assessor the amount of taxes due on the assessment of office fixtures, to-wit, \$29.40; that the property mortgaged would not sell at forced sale

for more than \$20,100, and that the mortgagors are insolvent; that complainant is ready and willing and offers to pay and discharge the taxes assessed against the real estate to the several mortgagors whenever the same shall become due and payable; that defendant refuses to accept the tax on said office furniture; that to require complainant to pay the taxes as levied on said mortgages, and also to require the property described in said mortgages, to pay the full taxes already levied upon it, will in effect be to require said complainant to pay a double tax; that complainant is and was assessed for the same fiscal year on its personal property, capital stock and effects, of which said mortgages and the money secured to be paid by the same is a part, in the Territory of Colorado; that said defendant as assessor of Lincoln county, without due or any process of law whatever, seized, and now threatens to sell and unless restrained and enjoined, will sell, the office fixtures of complainant for the taxes assessed and levied by him to complainant on said mortgages and office fixtures to satisfy said tax amounting to \$1706.73; that complainant has no speedy or adequate remedy at law; that should defendant sell said fixtures complainant will be greatly and irreparably damaged and injured, and that said defendant is wholly unable to respond in damages. Complainant therefore prays that defendant be forever restrained and enjoined from in any manner meddling or interfering with or disposing of the office fixtures of complainant.

To this bill the defendant interposed a demurrer upon two grounds: "First. That it appears upon the face of the said complaint that this court has not jurisdiction; Second. The complaint does not state facts sufficient to constitute a cause of action." This demurrer was sustained, and complainant failing to amend, judgment was entered in favor of defendant for costs. Complainant appeals. The first question presented by the record is that of jurisdiction. Assuming the tax to be illegal and void, is there any ground presented in the bill that justifies the interposition of a court of equity to enjoin the tax levied upon the money secured by mortgage?

The general principle is well settled by the weight of reason

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and a decided preponderance of authorities that no court of equity will ever allow its injunction to issue to restrain the collection of a tax, except where it is actually necessary to protect the rights of citizens who have no plain, speedy and adequate remedy at law. It has been so decided in this court. (*Conley v. Chedic*, 6 Nev. 223.) It must, in the language of the authorities, appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury; or, if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud, before the aid of a court of equity can be invoked. There must in every case be some special circumstances attending a threatened injury of this kind, which distinguishes it from a common trespass, and brings the case under some recognized head of equity jurisdiction, before the extraordinary and preventive remedy of injunction can be invoked.

The necessity of strictly adhering to this rule is obvious. The legislature is invested with the sole power of providing the modes by which state and county taxes shall be levied, assessed and collected, and it is essential that the modes prescribed, if within constitutional limits, should be faithfully carried out by the officers to whom is intrusted the duty of their enforcement. The state and county governments are dependent for their support upon the taxes imposed upon the property of their citizens, and experience and observation teaches us that the payment of taxes has very often to be enforced by summary and stringent means against the adverse sentiment and persistent resistance of the taxpayers.

Under the revenue laws of this state if the owner of any property refuses to make a statement under oath of all real estate or personal property within the county, "owned, claimed by, or on deposit with, or in the possession or control of such person," the assessor "shall make an estimate of the value of such property, and assess the same accordingly." (2 Comp. L. 3130.) The assessor and his sureties are liable for the taxes on all taxable property within his county, which is not assessed through his willful neglect.

(2 Comp. L. 3131.) When he assesses the property of any person or persons, company or corporations, liable to taxation, who do not own real estate within the county," it is made his duty to "immediately collect the taxes on the personal property so assessed, and if such person or persons, company or corporations, shall neglect or refuse to pay such taxes, the assessor, or his deputy, shall seize sufficient of the personal property of the person or persons, company or corporations, so neglecting or refusing to pay, to satisfy the taxes and costs," and proceed to sell the same pursuant to the provisions of the statute. (2 Comp. L. 3149.)

With such collections courts of equity ought never to interfere unless the bill clearly shows that complainant is likely to suffer some great or irreparable injury from the acts of the officer, and further shows that he has no plain, speedy or adequate remedy at law.

The question under review has often been presented to the courts of New York. As early as 1822, in the case of *Movers v. Smedley*, where a bill was filed to enjoin the collector of a town from collecting a tax, on the ground that the supervisors had levied the same in direct violation of law, Chancellor Kent said: "I cannot find by any statute or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors;" that the review and correction of errors, mistakes and abuses of the officers in the exercise of their duties "has always been a matter of legal, and never a matter of equitable cognizance," and that "in the whole history of the English court of chancery, there is no instance of the assertion of such a jurisdiction as is now contended for." (6 John. ch. 28.)

These views of the learned chancellor were quoted with approval by Nelson, C. J., in the court of errors in the case of *The Mayor of Brooklyn v. Meserole*, 26 Wend. 138; and the principles therein announced have ever since been generally followed by the various courts of that state. (*Van Doren v. Mayor of New York*, 9 Paige, ch. 390; *Thompson v. The Commissioners of the Canal Fund*, 2 Abb. Pr. 251; *Wilson v. The Mayor of New York*, 4 E. D. Smith, 675; *Mes-*

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seck v. *The Board of Supervisors of Columbia County*, 50 Barb. 190; *Heywood v. City of Buffalo*, 14 N. Y. 538; *Hassbrouck v. Kingston Board of Health*, 3 Keyes, 482.)

The same question has been frequently decided in the Supreme Court of the United States.

In *Dows v. The City of Chicago*, Field, J., in delivering the opinion of the court said: "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." (11 Wal. 110.)

In *Hannewinkle v. Georgetown*, Hunt, J., in delivering the opinion of the court affirming the doctrine as announced in *Dows v. The City of Chicago*, said: "It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction." (15 Wal. 548.)

In the recent decision by the same court in the case of *Taylor v. Secor*, and other cases published in the *Chicago Legal News* of April 29, 1876, Miller, J., after reviewing the previous decisions upon this question, said: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say in addition to illegality, hardship, or irregularity the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship

or injustice of the law, or *any grievance which can be remedied by a suit at law*, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

This case does not, in our judgment, come within any of the exceptions to the general rule. There is no pretense that a multiplicity of suits would be avoided and no question of a cloud upon title to real estate is involved. There is no allegation of fraud, nor any other proper averment which brings the case under any head of equity jurisdiction. It is true the bill alleges that complainant has no speedy or adequate remedy at law and that it will be irreparably injured by the sale of its office fixtures. These allegations are wholly insufficient. The facts must be stated so that the court can judge whether the averments are true. In this case the allegations are based solely upon the alleged fact that the assessor is insolvent. But in this respect we do not think the bill states sufficient facts to authorize a court of equity to interfere. (*Ritter v. Patch*, 12 Cal. 299; *Branch Turnpike Company v. Board of Supervisors of Yuba County*, 13 Id. 190.)

The assessor, in assessing and attempting to enforce the payment of the tax, was pursuing the identical course indicated by the statutes of this state, and all his acts were within the line of his official duties as prescribed by law. His sureties are responsible upon his official bond for any damages that might accrue in consequence of any of his official acts, and it is nowhere alleged that they are insolvent. Moreover, if the taxes had been paid under protest, and the county had received the money, complainant could have brought its action against the county, and if the tax was illegal, could have recovered the money back. In the language of the Supreme Court of Connecticut: "It is difficult to see why he has not adequate remedy at law. There is no averment that the real estate of any of the parties has been or can be levied upon. The warrant authorizes the taking of personal estate only. No irreparable injury can arise from the levy. If the proceedings * * * are irregular and void, as the petitioners claim they are, an

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action at law will lie to recover all the damages which shall be sustained by the levy, and the question of the legality of the assessment will then be tried in its appropriate forum, a court of law." (*Dodd v. City of Hartford*, 25 Conn. 238.)

In the case of *The County of Cook v. The Chicago, Burlington and Quincy Railroad Company*, which was a suit in chancery, instituted by the railroad company against the county of Cook and its treasurer to restrain the collection of a tax assessed by the board of supervisors of said county upon the rolling stock of the company, the bill alleged that the levy of the tax was illegal and unjust; that complainant had been once taxed on said property, and had paid the taxes thereon, and that it was not liable to be again taxed. The court, after deciding that a court of equity had no jurisdiction in such a case, say: "Ordinarily, a party of whom a tax is illegally collected has an ample remedy at law, by an action of trespass against the officer collecting it, or by an action of assumpsit to recover back the money paid. In the case under consideration, if the tax was an illegal one, the appellee, after paying it, could have brought his action against the county and recovered the money back." (35 Ill. 466.)

To the same effect is the language of the court in *Dows v. The City of Chicago*, *supra*: "If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or the city, to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

In *Brewer v. City of Springfield*, which was a suit in equity to enjoin the collection of a tax which the bill alleged had been illegally assessed, Bigelow, C. J., in delivering the opinion of the court, said: "Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no

Points decided.

wrong; when they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy. We can see no ground on which a single taxpayer, who has been illegally assessed, can ask for the interference of a court of equity." (97 Mass. 154.)

These views are conclusive of this case. We therefore express no opinion upon the questions whether complainant was liable to be taxed on the money secured by mortgage, it being as alleged a non-resident of the state, or whether the tax as levied was a double tax. It will be time enough to decide these questions when they are properly presented for review.

The judgment of the district court is affirmed.

[No. 765.]

EUREKA MINING AND SMELTING COMPANY, APPELLANT, v. FRANK WAY, RESPONDENT.

ACTUAL POSSESSION OF LAND.—A perfect inclosure of timber land is not necessary. If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession that is required.

IDEM.—The acts necessary to constitute possession, must, in a great measure, depend upon the character of the land, the locality, and the object for which it is taken up.

IDEM.—Where the plaintiff relies solely upon possession there must be an actual and continuous occupation of the land, within such boundaries, a subjection of the land to the will and control of the claimant.

IDEM.—NATURAL BOUNDARIES.—Bluffs of rock, and summits of a mountain, may be so steep and rugged as to constitute a natural boundary of land. The question as to what constitutes natural boundaries discussed in the opinion.

IDEM.—The facts of this case discussed, and the acts of possession by appellant held insufficient to maintain the action. (*Beatty, J., dissenting.*)

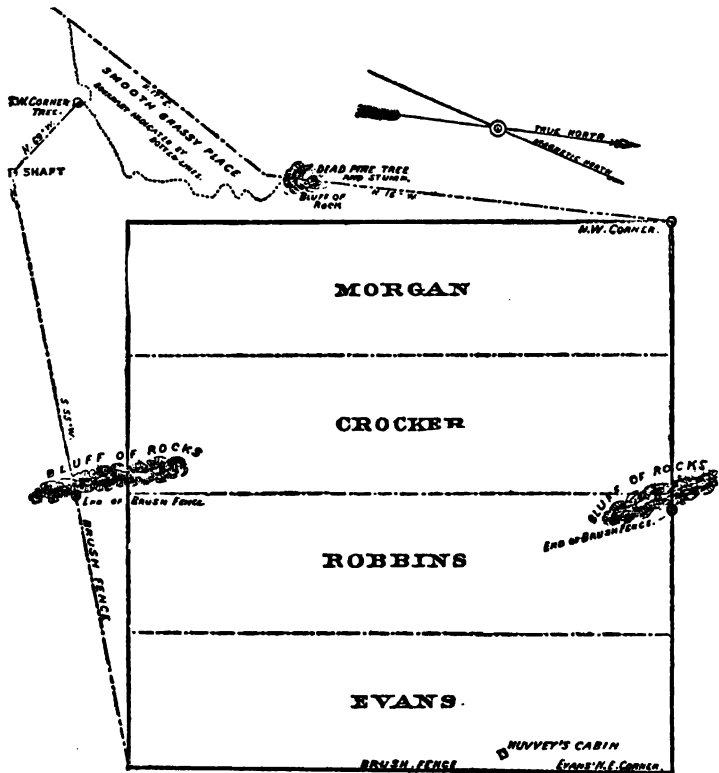
IDEM.—Natural boundaries, when taken in connection with artificial, are sufficient to make the boundaries of timber land; but the artificial boundaries must be made in such a manner as to clearly mark and define the lines, and must connect with the natural boundaries in such a manner that any person going upon the land could, by following the marked lines, tell the precise extent of the land located and claimed, and the claimant must be an actual occupant within such boundaries.

11	171
12	73
12	354
13	409
13	413
13	414
19	42
5*	660

Argument for Appellant.

APPEAL from the District Court, Sixth Judicial District, Eureka County.

The following are the outlines of the map referred to in the opinion:



The facts are sufficiently stated in the opinion of the Court.

Hillhouse & Davenport, for Appellant.

I. The question involved in this appeal is: Was there sufficient testimony on the question of possession by plaintiff, or its grantors, to submit to the jury?

The object of the inclosure of timber land is to notify sub-

Argument for Respondent.

sequent comers that the land is claimed—is located, and that it is being used for some beneficial purpose. If that object is fully obtained by other than building brush-fences or blazing trees, the intent of the law is satisfied. The summit of the mountain—the rocky bluffs or points with which the fences connect,—the fact that wood and timber cannot be taken off at those parts of the tract, taken together with the brush-fences on the east side, and along portions of the north and south ends, render it perfectly clear what was claimed by plaintiff. That no wood or timber could be taken from that tract, without crossing those brush-fences, of itself, would notify any subsequent comer. But in addition to this, most of the timber on this tract lays up in three cañons, with steep sides, across the mouth of each of which, in addition to the brush-fence, were placed bars and ditches, which, to use the language of witnesses, inclosed that land as effectually as would a fence across the neck of a peninsula inclose it.

II. If the claimants, although they had no fences, yet exercised dominion and control over the land, and subjected it to their power, the matter of fences become immaterial and unimportant. It is well settled that actual possession of land may be had without fences or inclosures. (*Ware v. Scott*, 2 Dana Kent R., p. 275; *Ellicott v. Pearle*, 10 Pet. 442; *Ewing v. Burnett*, 11 Id. 41-9; *Hicks v. Coleman*, 25 Cal. 132; 17 Id. 463; *Bene v. Gratz*, 5 Wheat. 222; *Wolfskill v. Malajorich*, 39 Cal. 276; 45 Id. 496; *Rogers v. Cooney*, 7 Nev. 219; *McCreery v. Everding*, 44 Cal.)

III. If in the whole transcript there is any evidence that would support a judgment, in plaintiff's favor, a nonsuit should not have been granted. (*Sharon v. Davidson*, 4 Nev. 416.)

Thomas Wren and D. E. Bailey, for Respondent.

The principal questions involved in the discussion of this case relate to the kind of possession of the public timber lands in this state a party must have to entitle him to maintain an action of trespass for cutting timber thereon, and these questions are settled by the authorities: *Sankey v.*

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Noyes, 1 Nev. 68; *McFarland v. Culbertson*, 2 Nev. 280; *Eureka M. & S. Co. v. Way*, 9 Nev. 350.

If the land upon which it is alleged the trespasses were committed by defendant had not been marked by "metes and bounds, so that the boundaries could be readily traced and the extent of the claim easily known," at the time the alleged trespasses were committed, the judgment of nonsuit should be affirmed. It was not urged upon the trial of this case that natural boundaries were not as effectual for all purposes as artificial boundaries. Neither did the court so decide or intimate upon granting a nonsuit. On the contrary the case was tried upon the theory from first to last, that natural, taken in connection with artificial, boundaries were sufficient in law to mark the boundaries of timber land. What the court did decide, was, that plaintiff did not show that the boundaries of the land in dispute were ever sufficiently marked by either natural or artificial means. The boundaries were not so marked that they could be easily traced and the extent of the claim readily known.

By the Court, HAWLEY, C. J.:

This is an action to recover damages for an alleged trespass in cutting and carrying away wood and timber from a tract of six hundred and forty acres of land claimed by appellant.

The real question presented by this appeal, which is taken from an order of the court granting a nonsuit, is whether or not there was sufficient evidence as to the possession of the land by appellant and its grantors to authorize the court to submit the case to the jury.

The land is situate on the eastern side, or slope, of a mountain, and is valuable only for the wood and timber thereon. The ranch is cut up by ravines and cañons, which in many places are very precipitous, and it is described as a "rough, rugged, rocky piece of ground," over which "timber grows in bunches." There is a well-defined brush fence along the east line or boundary, and a similar fence on the north and south lines, from the east line about half way toward the summit of the mountain, which is claimed

as the western boundary. The fence on the north and south lines stops at a bluff of rocks which run in a northerly and southerly direction. From the bluff of rocks to the summit the lines are claimed to be designated by blazed trees.

Without here entering into the details of the testimony, it may be stated, in general terms, that for more than one-quarter of a mile on the south line between the bluff of rocks and the summit of the mountain there are no blazed trees to designate the boundary, and for a distance of twelve hundred and sixty feet from the southwest corner along the western line, over a smooth, grassy plot, to adopt the language of the witness Jenkins, "there is no monument, tree, or anything else to mark the line."

Under the decisions of the supreme court of this state, a perfect inclosure of timber land is not necessary. "If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession which the courts of this state have ever deemed necessary to require." (*McFarland v. Culbertson*, 2 Nev. 282.) This principle was announced in a case, where, to quote from the opinion, it was clearly shown by the testimony introduced by the plaintiff that the fence, which consisted of felled trees, brush, and stone, was continuous and unbroken around the entire claim, except upon one side, where there was an opening of some few yards, but upon that side it joined a tract which was completely inclosed with the same character of fence." The court, upon this testimony, said it was established beyond question that the fence distinctly marked the boundaries of the plaintiff's claim, and held that: "That character of inclosure, together with the continuous occupation by the plaintiff, certainly constituted such a possession as would entitle him to recover in ejectment against any subsequent locator who had no title from the government."

Under this liberal rule, the acts necessary to constitute possession, "must in a great measure depend upon the character of the land, the locality, and the object for which it is taken up." (*Sunkay v. Noyes*, 1 Nev. 71.) In every case where the plaintiff, as in this case, relies solely upon

possession, an actual and continuous occupation of the land, within such boundaries, must be shown. There must be a subjection of the land to the will and control of the claimant. This principle is announced in both of the cases above cited, discussed at length in *Staininger v. Andrews*, 4 Nev. 66; *Robinson v. The Imperial Silver Mining Company*, 5 Nev. 66; and adhered to in *Kraft v. Carlow*, 9 Nev. 21.

It is evident that the material facts elicited at the trial fell far short of meeting the requirements of these decisions. In the absence of a perfect inclosure, it is certainly essential that the boundary lines should be so clearly marked and defined that the same could be readily traced, and the extent of the claim easily known, and no stretch of imagination could be so extended as to authorize any court to hold that the boundary lines were so marked and defined around the land in question. How could a stranger crossing over the smooth, grassy spot designate the boundary? There is no fence, no string of brush, or felled trees, no mark or monument for a distance of one quarter of a mile. Almost the same condition of the boundary is found on the south line between the bluff of rocks and the southwest corner. A stranger in entering would discover no visible signs of any designation of boundaries whatever. The law does not require any speculation upon these points. The acts necessary to clearly mark the boundaries must be done in order to notify strangers that the land is located, otherwise any person would have as much right as the claimant to enter upon the land, cut the wood and timber thereon, and take the same away. In such a case, both would be trespassers upon the public land.

The necessity of adhering to the rule which requires the boundaries to be clearly marked and defined becomes apparent upon an examination of the evidence in this case. It is claimed by appellant that the summit of the mountain constitutes a natural boundary, and that it was unnecessary to mark or define the west line. G. Collier Robbins, who for several years claimed to have the control of the land, and who rode on horseback, without much difficulty, over and along the summit to see about the west line, says: "I

found it so rocky and precipitous about the head of the cañons, that I thought I would do nothing about that line. * * * There was no fence put along the west line (or), on the south of the west line, because it was so steep that there appeared to be no necessity for a fence. * * * There is a large grassy plot near the southwest corner. There is very little timber on the bald mountain. I considered the bald mountain and the grassy spot and bluff along the west line a natural boundary, and for that reason I did not have anything done with the line. I considered the summit a plain natural boundary. There is a bluff of rocks on the north line which forms a natural boundary. Taking that bald mountain, the summit, those bluffs and fences, and no man could go upon that ranch and not know what was claimed." This testimony clearly states appellant's case, and the last sentence quoted indicates the theory upon which appellant relies.

It is contended that the only object of an inclosure is to notify subsequent comers that the land is located and claimed and is being used for some beneficial purpose, and if that object can be fully obtained by any other means than building fences, or blazing trees, the intent of the law is satisfied. This argument is specious. A moment's thought will expose its fallacy. If adopted, all that the claimant would have to do in order to accomplish the object would be to employ a sentinel to remain upon the land and notify every man who attempted to enter that it was located and claimed, and to point out the boundary lines. No one will pretend that this would be a compliance with the law. Even appellant admits the fact that the lines must in some manner be designated by visible boundaries, and to sustain its theory we find "bluff of rocks," "bald mountains," "summits," "skirts of timber," "slopes of the hill," and "hillsides," interjected from the lips of witnesses, to fill up the gaps unmarked on the pretended boundaries of the land. That bluffs of rocks may form a natural boundary is undoubtedly correct. The law does not require a vain and useless thing to be done, and there would be no sense in a law which required the erection of a fence over a bluff of

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rocks so steep and rugged that neither man nor beast could travel over it. *Lex non cogit ad impossibilia*. The same might be true of the summit of a mountain. But the map which accompanies the transcript, and which is referred to in the evidence, shows the extent of the bluff of rocks which are found on the north and south lines. If the brush fence had been continued on the west side of the bluffs of rocks these boundaries would have been properly defined, but the bluff of rocks, as before stated, extends in a northerly and southerly direction, and do not follow the line claimed as the boundary. A stranger, then, following the brush fence to ascertain the lines, finding that it stopped on the east side of the bluff, would naturally suppose that the bluff of rocks was intended for the western boundary instead of, as claimed, being a part of the north and south lines. This, by an examination of the map, is made too clear for argument. This may have been the belief of the respondent, for it appears that he did not enter upon, or cut any wood or timber, or claim any portion of the land on the east side of the bluff of rocks where the brush fence terminates.

Appellant is equally unfortunate in its attempts to define the western line. Samuel Watson, who assisted in building the fence and blazing trees, defines what he considers a natural boundary, as follows: "If I was allowed to answer as I want to I would say the summit forms a natural boundary." From his subsequent testimony it clearly appears that he was allowed to answer as he wanted to, and we have his full definition clearly given. "The proper meaning of the summit, to come right down to it, would be to come up near to the summit; we did not pretend to go in a straight line. * * * What I understand by a natural boundary is such that a man could not haul wood across with a profit." This definition of a natural boundary is unique. It certainly cannot be found in any dictionary, nor sanctioned, we apprehend, by any decided case. If adopted, how would a stranger ever be notified that any tract of land was located or claimed? Whenever he sees a brush fence on one line, he need not look for any marks, stakes, monuments, blazed trees, or fences, to designate any other

line; but must first ascertain whether any wood or timber could be hauled off the land with a team without crossing the brush fence; and if this is ascertained in the affirmative, he must next determine by an arithmetical calculation whether it could be so hauled off with a profit, and at whatever point this could not be done, whether it be on the summit of a mountain, slope of the hill, smooth, grassy spot or level plain, there is the natural boundary beyond which he dare not enter without fear of being mulcted in damages. It would indeed be a difficult task to define the limits of the land claimed within such boundaries. Litigation would be endless; for the question whether wood could be hauled from any given point over certain boundaries, would, among other things, be dependent upon the means, energy and economy that might be employed by different persons. This, however, is the imaginary line designated as a natural boundary, which could be readily traced by a stranger. It is absolutely necessary for appellant to insist upon the correctness of this position in order to maintain this action. Nearly every witness examined by appellant testified that some wood and timber might be hauled over the lines without crossing any of the fences built by appellant or its grantors. Watson says: "Up near the summit, where Way took up the land, you could, by taking the timber and wood up the hill a little, * * get a little off; but further down I think it would be an impossibility." How much further down? Where is the line? How determine this imaginary boundary up to which the right to cut wood exists, but to cross beyond which would constitute a trespass. The same witness says: "At the line along the southwest corner I think you could get considerable wood by taking it into the Secret Cañon road." And McKenzie testifies that: "Timber might be taken off at northwest and southwest, and west and north sides of the ranch between the bluff of rocks, at which the brush fence terminates on the south line, and the next bluff west or southwest from it. The ground is perfectly smooth; * * could build a road out between these bluffs and take out a great deal of timber."

Each witness has a different theory by which the boundary lines could be designated. One thought the skirt of timber high up near the summit constituted the west line, it being shown that the line of timber gives out near the summit; in some places coming within three hundred feet, and at others being three hundred yards from the summit. Alfred Perkins, after stating that "the fences and mountains and precipitous rocks" would cause him to believe that "the wood was taken up and located," says: "the hillside and mountain-top make a natural boundary." If he had confined himself to the mountain-top his meaning would be clear, but when he includes the hillside he takes in the whole ranch. As we proceed, the boundary becomes more visionary. John Horn testifies: "From the formation of the country, and the fences * * * I should consider the west line the best defined line on the ranch." Why? "Because "I have been along the mouths of the cañons and I can see no way that timber could be taken from those cañons without crossing out at the mouths of the cañons." He next declares that: "The lines can be readily traced and the extent of the ranch easily known from the fences and natural boundaries;" although he was never on or near the west line. The declaration is based entirely upon his general observations and his own peculiar ideas of a natural boundary. "I never was on the western line of the ranch, I saw it from the eastern side of the ranch. Was never along the lines of the ranch." And yet he testified that the lines could be readily traced. How? He explains it in this manner: "I call that western line a natural boundary. The eastern slope of that mountain forms the boundary." Now we have seen that the whole ranch is on "the eastern slope of that mountain," and if we adopt the views of this witness the entire ranch becomes a natural boundary which can readily be traced. But he is still more explicit. "There is no way by which timber can be hauled from off that ranch, by the means ordinarily used in this country to haul timber, without crossing some of the brush fences on the ranch." In another portion of his testimony he says: "there is nothing marking the line on the west side except the hillside," and

in further explanation of the line on the summit and eastern slope of the mountain, says: "I look at it as a natural boundary because you cannot cross it with a team." If this latter definition of a natural boundary is correct, then what becomes of the grassy spot over which, according to the testimony of the witness, Robbins, "a sixteen-mule team could be driven." To designate that part of the line, this witness corroborates the statement of the witness, Watson, and says: "Timber could not be got off this ranch, *to pay*, without crossing some of the fences."

This is the general outline of the testimony, from which it appears that the west line is marked and defined by the different theories of witnesses, adopted at various points as the emergency of any given locality may require. To illustrate: the summit of the mountain, slope of the hill, and skirt of timber on the western line, for three quarters of a mile, is a natural boundary because you cannot drive teams over it. The smooth, grassy spot on the same line, for the other quarter of a mile, is a natural boundary because you cannot haul wood or timber over it with a profit. The same may be said of the west half of the north and south lines. But the unsoundness of the position contended for by appellant is still further demonstrable. In many places the wood on the ranch has to be cut on the hillsides and sledged down into the cañons. It appears from the testimony that it is a common practice to pack wood from the mountains with mules and donkeys, and that this could readily be done without crossing any of the fences or roads erected by appellant, its grantors or predecessors in interest. We know of no rule that would compel a man to haul wood with a team when he could make it more profitable by employing other agencies. It is useless to comment further upon the testimony. Objections to its sufficiency could be multiplied and extended without limit, *ad libitum*. The fact is everywhere patent that the lines cannot be readily traced, nor the extent of appellant's claim easily known, from any natural or artificial boundaries. The theory upon which appellant bases its claim cannot be sustained upon reason or authority. The question whether wood or timber could be

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hauled off from any portion of the land, with or without a profit, without crossing some of the roads or fences built by appellant's grantors, was wholly immaterial, and ought not to have been admitted. In what manner were the boundary lines marked and defined? This was the material question to which the testimony should have been directed. That natural boundaries, when taken in connection with artificial, are sufficient to mark the boundaries of timber land, will not be disputed; but the artificial boundaries must be made in such a manner as to clearly mark and define the line, and must connect with the natural boundaries in such a way that any person going upon the land could by following the marked lines tell the precise extent of the land located and claimed, and the claimant must be an actual occupant within such boundaries. Numerous authorities are cited by appellant to the effect that actual possession of land may be had without fences or inclosures; that the claimant's dominion and control over the land may be shown by proof that he lives upon it, cultivates a portion of it, &c. &c. This rule is correct when applied to the facts of the cases cited. But it has no application whatever to the facts of this case. Where the land is held in private ownership, and a party enters in good faith, under a deed calling for specific boundaries, the entry is in harmony with his claim of title, and "sound reasons of justice and public policy demand that his possession should be deemed to be co-extensive with the calls in his deed, provided that no other person be in the actual possession. But the reason for the rule wholly ceases when the grantee, at the time he took the conveyance, knew the land granted to be a part of the public domain, and that the deed was wholly inoperative to convey any title, whether legal or equitable. (*Wolfskill v. Malajovich*, 39 Cal. 281.)

Where a party enters upon land knowing the same to be a part of the public domain he is only entitled to recover as against a trespasser having no title, upon showing such facts as will be sufficient to raise a presumption of title in himself, and in cases like the one under consideration the presumption of title extends only to the actual possession,

Opinion of Beatty, J., dissenting.

the *possessio pedis*, and whenever the plaintiff fails to show such possession he fails to make out a case.

The judgment of the district court is affirmed.

BEATTY, J., dissenting:

I think that, in this case, there was testimony sufficient to entitle the plaintiff to the finding of a jury on the question of possession, and therefore I dissent from the opinion of the court. There was ample proof that the plaintiff and its grantors had been in the notorious occupancy of a portion of the tract claimed a long time before the defendant entered. They had built roads and cabins and felled trees. The only question was, whether the boundary of their claim was sufficiently defined to be readily recognized and traced. I quite agree with the court that upon this point the case made by the plaintiff was a weak one, and particularly that its theory of a natural boundary on the west, and on portions of the north and south lines is untenable. But there were one or two witnesses whose testimony as to the artificial boundaries was sufficient in my opinion to make out a *prima facie* case. Putting the most favorable construction on their testimony and taking it for true, it proved that the east line was marked by a continuous fence, the north line by a fence half the distance and by blazed trees for the balance. From the northwest corner the west line was marked nearly three-fourths of its length by blazed trees, and from the southeast corner the south line was marked half way by a fence and for the rest by a few blazed trees near the southwest corner. There was something over a quarter of a mile of the south line, and a little less than a quarter of a mile on the west line, not marked in any way, but it was the opinion of several of the witnesses that no man could have gone upon the ground and failed to see what land was claimed. It is true they differed among themselves as to the exact boundaries, and a jury might readily have differed from them all, but I think nevertheless, the question should have been submitted to the jury. The language of this court in the case of *Sharon v. Davidson*, 4 Nev. 419, seems to be exactly in point: "There was

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evidence tending to prove a survey, a marking of lines by blazing and felling trees, building a mill and other houses, cutting timber and wood and other acts of appropriate dominion. Whether this was sufficient to establish plaintiff's claim was for the jury, not the court, to decide."

I think the judgment should be reversed.

[No. 731.]

AMBROSE GAUDETTE, RESPONDENT, v. WILLIAM C. GLISSAN, LOUIS SULTAN AND JOHN ROEDER, APPELLANTS.

WHEN APPEAL WILL BE DISMISSED.—When the appellant fails to furnish this court with a "notice of appeal" and "undertaking on appeal," as required by the statute, the appeal will be dismissed.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

Pitzer & Croyland, for Appellants.

A. B. Hunt and George Goldthwaite, for Respondent.

By the Court, HAWLEY, C. J.:

The proceedings in this case, entitled as above, were instituted under the provisions of section 591 of the civil practice act (1 Comp. L., 1652), upon the motion of W. S. Travis, sheriff of Lincoln county. The appellants being the sureties upon an indemnifying bond given to said sheriff. After a hearing, the court rendered a judgment in favor of the respondent A. Gaudette, and against the appellants Glissan, Sultan and Roeder, for the amount recovered against the sheriff by the plaintiff in the suit of *A. Gaudette v. W. S. Travis*, ante, 149.

Upon an examination of the transcript on appeal, we are unable to find any notice of appeal given upon the part of the above-named appellants, or either of them. The statute provides that "any party aggrieved may appeal" in certain cases, and that "the party appealing shall be known as the

appellant, and the adverse party as the respondent." (1 Comp. L. 1390.) It is made the duty of the appellant to furnish this court "with a transcript of the notice of appeal," and if this is not done "the appeal may be dismissed." (1 Comp. L., 1401.)

The only notice of appeal contained in the transcript reads as follows:

"A. GAUDETTE, Plaintiff, v. W. S. TRAVIS, Defendant.

"You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this state from the judgment and orders therein made and entered in the said district court on the eleventh day of March, A. D. 1875, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof.
* * *

"Yours, etc.,

"PITZER & CORSON,

"Attorneys for Defendant.

"To the clerk of said district court, and George Goldthwaite, Esq., attorney for plaintiff."

No judgment has been rendered against Travis in this proceeding. The only judgment in the case was, upon the motion of said Travis, entered in favor of the plaintiff, A. Gaudette, and against Glissan, Sultan and Roeder, the sureties upon the indemnifying bond, and they have not taken any appeal.

Again: "To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant." (1 Comp. L. 1402.) The appellants in this proceeding have not given any undertaking on appeal. The undertaking on appeal contained in the transcript is entitled the same as the notice of appeal in the suit of A. Gaudette, plaintiff, v. W. S. Travis, defendant, and recites that: "Whereas the defendant in the above-entitled action appeals * * * from a judgment entered against him in said action * * *. Now, therefore, * * * we * * * do undertake and promise on the part of the appellant that

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the said appellant will pay all damages and costs which may be awarded against him on the appeal.”

The appellants in this proceeding having failed to furnish any notice of appeal or undertaking on appeal, as they were required to do by the above provisions of the statute, it follows that the appeal must be dismissed.

It is so ordered.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1876.

11	127
12	164
12	165
12	167
12	171
12	174
12	176
12	178
12	182
12	185
12	187
12	234
18	74
1*	379
18	76
1*	380

[No. 749.]

**H. P. PHILLIPS, RESPONDENT, v. WILLIAM WELCH
ET AL., APPELLANTS.**

JURISDICTION—QUESTION OF, RAISED BY THE COURT.—As every court is bound to know the limits of its own jurisdiction, it is the duty of the court to decide, *in limine*, the question of jurisdiction, although the parties before the court are willing to concede jurisdiction for the purpose of obtaining an opinion upon the matters in controversy.

CONTEMPT OF COURT—WHEN PROCESS IS CIVIL.—If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such case is not punitive, but coercive.

IDEM—WHEN PROCESS IS CRIMINAL.—If the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive.

IDEM—APPELLATE JURISDICTION.—This court has no appellate jurisdiction in cases of contempt, where the proceeding is purely criminal.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The question of jurisdiction was not discussed by counsel.
The facts are stated in the opinion.

DeLong & Belknap and John R. Kittrell, for Appellant.

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Robert M. Clarke and R. S. Mesick, for Respondent.

By the Court, BEATTY, J.:

In the above-entitled action there was a final decree by which the waters flowing in King's cañon, in Ormsby county, were apportioned to the different parties, plaintiff and defendant, and each enjoined from diverting any portion of the waters awarded to the others. One of the defendants, E. D. Sweeney, was attached for an alleged violation of the decree, found guilty of a contempt of the court, and fined one hundred dollars. From that conviction he appeals to this court, entitling the case on appeal as above.

It was suggested to counsel, during the oral argument, that it was doubtful if this court had any jurisdiction in the matter, but the point was waived by the respondent (Phillips) at the time, and he has not adverted to it in his brief since filed. It has therefore become necessary for the court to decide, *in limine*, whether in a case like this, where the parties before the court are willing to concede jurisdiction for the purpose of obtaining our opinion upon the matters in controversy, we ought to raise the question of jurisdiction ourselves.

Upon due consideration we are satisfied we ought to do so. Every court is bound to know the limits of its own jurisdiction, and to keep within them. It is very true that the question of jurisdiction is often difficult of solution, and that argument of counsel is as essential to its proper determination as it is in any other class of questions; but we are nevertheless of the opinion that when a doubt is suggested as to our authority to decide a cause, if counsel decline to argue the point, we are bound to determine it without the aid of argument. Especially is this our duty where all the parties to be affected by our decision are not before us. In this case the state is an interested party, since the fine imposed upon Sweeney is payable to the state; and if consent could in any case confer jurisdiction, we are not permitted to assume it here, because the state is not represented upon this appeal, and has not consented to submit her rights to our decision.

Has this court then any appellate jurisdiction in this case? One of the propositions laid down by the appellant in support of his assignments of error is, that "contempt of court is a specific criminal offense." If this proposition is to be accepted as true, without qualification, and if the process of attachment for contempt is a criminal proceeding, then, as this court has no appellate jurisdiction in criminal cases, unless they amount to a felony, it follows necessarily that it has no jurisdiction in this case. But the appeal is taken upon the assumption that the process against Sweeney is not criminal, and that the judgment of the court convicting him of the contempt is an order made in the civil action of *Phillips v. Welch* after final judgment, and is appealable under subdivision three of section 1391 of the compiled laws. It is no doubt true that attachment for contempt is sometimes to be regarded as process in a civil action. Blackstone (in Book 4, chap. 20) treats of contempts under the head of summary convictions. They are classed with other misdemeanors, from which they are distinguished only by the mode in which they are prosecuted, every superior court being necessarily invested with jurisdiction to punish contempts of its authority by summary process. But in enumerating the different species of contempts, he mentions: "6. Those committed by parties to any suit or proceeding before the court; as by disobedience to any rule or order made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires after having entered into a rule for submitting to such determination. Indeed, the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court, and therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by the general act of pardon."

By parity of reasoning it would seem that such contempts would be appealable under the provision of our practice act above cited. But the question remains whether the contempt alleged against Sweeney is one of those, the process in which is regarded as a civil execution for the benefit of the injured party. It is probably comprised in the species described, but Blackstone does not say that every case comprised in this species is regarded as a civil proceeding. His language is, "most of this species," and the examples given in illustration are, non-payment of costs and non-performance of awards. These examples I think, clearly indicate the criterion by which it may be determined whether the process is civil or criminal. If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil and he stands committed till he complies with the order. The order in such case is not punitive, but coercive. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone is interested in the enforcement of the order, and the moment he is satisfied, the imprisonment terminates; in the latter case the state alone is interested in the enforcement of the penalty. It is true the private party receives an incidental advantage from the infliction of the penalty, but it is the same sort of advantage precisely which accrues to the prosecuting witness in a case of assault and battery, the advantage being that the punishment operates *in terrorem*, and by that means has a tendency to prevent a repetition of the offense. The principle of discrimination between the civil and criminal process for contempt here indicated, though not expressly recognized in any of the cases that have fallen under our observation, is entirely consistent with all the decisions, and is the only means of rendering them consistent with each other. It may, therefore, be considered established by them.

The case of *New Orleans v. Steamship Company*, cited by

appellant to the point that contempt is a criminal offense, is very closely analogous to this. The company had procured an injunction against the city from the United States Circuit Court, and pending the proceedings the mayor of the city obtained an injunction from a state court against the company. For this he was attached and fined \$300. The case was appealed to the Supreme Court of the United States, where a reversal of the judgment in the contempt proceeding was asked. But Judge Swayne, delivering the opinion of the court, said: "The fine of \$300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

The other case cited by appellant to the same point (*B. & O. R. R. Co. v. Wheeling*, 13 Grattan's Va. R. 57), was where the defendant had been fined for disobeying an injunction *pendente lite*, and the supreme court of Virginia said: "As to the order of the circuit court in the proceeding for contempt, it is not an interlocutory order made in the cause, much less an order adjudicating the principles of the cause. A contempt of court is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding, the judgment in such a proceeding can be reviewed by a superior tribunal, only by writ of error, and not always in that way."

These two cases clearly establish the following propositions: First. An act done by one party to an action in violation of the rights of another party, if it is a contempt, is a distinct criminal offense. Second. The proceeding to punish it is a distinct criminal proceeding; and, Third. The appellate court can have no jurisdiction of it except as a criminal case. As this court has no appellate jurisdiction in criminal cases, unless they amount to felonies, it follows that this appeal does not lie.

The decisions in the state of New York sustaining the

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right of appeal from judgments or orders in proceedings for contempt, so far from being in conflict with this view, really sustain it. By the statute of New York, the process of attachment for contempt is not only a means of punishment but also of compensation to the injured party. His damages are computed and payment enforced in the proceeding, and it is for this reason that an appeal is allowed. In the case of *Ludlow v. Knox*, the defendant was fined for not producing his books before a referee. On appeal from the order the court said: "Counsel for respondent insists that the order is not appealable to this court, and that the appeal should, for this reason, be dismissed. If the proceedings are to be regarded as taken in the action of *Ludlow v. Knox*, the counsel is right in the position. * * * If the order is one not made in the action, but in a special proceeding instituted to redress an injury sustained by the plaintiff, caused by the violation of the order made in the action requiring the appellant to produce his books, etc., before the referee, it comes within subdivision 3" (section 11 of the code), "and is appealable to this court, as a final order made in a special proceeding affecting a substantial right. I think the order belongs to the latter class." (See the whole case, 7 Abbott's Pr. Rep. 416.)

It will be observed that in this case the contempt consisted in the refusal to do what was ordered, not in the doing what was forbidden. An appeal was allowed, however, in the subsequent case of the *Erie R. R. Co. v. Ramsay* (45 N. Y. 642), where the contempt alleged was a violation of an injunction. In that case the court merely adopted the decision in *Ludlow v. Knox*, assuming that under the statute of New York there was no distinction between the cases where the contempt consists in the refusal to do an act commanded, and where it consists in the doing of an act forbidden. This assumption was probably correct, for in both cases the proceeding was instituted for the recovery of damages by the injured party, and in both cases damages had been awarded.

In California an appeal was sustained in the case of *The People v. Charles P. O'Neil*, from a judgment convicting the defendant of a contempt of court. O'Neil was charged with violating an order made in a habeas corpus proceeding, and fined three hundred dollars for the contempt. He appealed to the supreme court, entitling his appeal as above. The attorney-general appears to have objected to the jurisdiction, but upon what ground it is not stated. The court simply say, touching this point: "We think the judgment appealed from is appealable. It is for money and sufficient in amount to give jurisdiction to this court." (47 Cal. 109.) The reason here assigned appears to be entirely inconclusive. It could have been urged with just as much force and propriety if the defendant had been fined three hundred dollars for assault and battery. The decision, moreover, appears to be in conflict with that in *Batchelder v. Moore* (42 Cal. 413), where a judgment for contempt was reviewed on certiorari, for if an appeal lies, certiorari does not. In the last named case Calderwood, who was not a party to the action, was fined five hundred dollars. O'Neil, who was not a party to the habeas corpus proceeding, was fined three hundred dollars. If O'Neil could appeal, it is difficult to see why Calderwood could not appeal, and if he could appeal he was not entitled to the writ of certiorari. Possibly the case of O'Neil may be considered as overruling *Batchelder v. Moore*, but the court do not avow any such intention; on the contrary, they cite that case as authority on another point. Ill considered as the case of O'Neil appears to have been, it is not entitled to much weight or authority; but if we were inclined to follow it, it would not help this appellant, for the amount of the judgment is not sufficient to give this court jurisdiction. We are not, however, inclined to follow that case; our conclusion being that we have no appellate jurisdiction in cases of contempt where the proceeding is, as it is in this case, purely criminal.

In addition to the authorities above cited, we refer to *Crosby's Case*, (3 Wilson, 188); *Yate's Case*, in its various forms, (in 4, 5, 6 and 9, Johnson's Reports,) and particularly to the opinion of Chief Justice Kent, (4 Johns. 370-75); *Ex parte*

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Kearney, (7 Wheat. 38); *Passmore Williamson's Case*, (26 Penn. 20,) and the authorities there-cited.

For the reasons above stated, it is ordered that the appeal herein be dismissed.

 [No. 747.]

ALVARO EVANS, APPELLANT, v. L. W. LEE,
RESPONDENT.

POWER TO SELL WITHOUT FORECLOSURE.—A power to sell without foreclosure is operative when the intention to confer it is clearly expressed.

SECONDARY EVIDENCE — WHEN ADMISSIBLE. — Where the proof shows that the instrument which plaintiff wishes to produce in evidence is out of his power to obtain, and is beyond the reach of the process of the court, secondary evidence of its existence and contents is admissible without regard to the provisions of the recording act.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED.—A certificate of the vice-consul-general of the United States at London, under his official seal, is *prima facie* evidence of the execution of a deed.

FOREIGN CORPORATIONS — ACT OF MARCH 3, 1869, (STAT. 69, 115.) CONSTRUED.—The intention of the act requiring all foreign corporations to file, in the office of the county recorder, an authenticated copy of their certificate, or act of incorporation, etc., was obviously to compel such corporations, when doing business in this state, to furnish easily accessible evidence of their existence, and of the names of their officers.

IDEM.—Where a paper was filed by the corporation, under said act: *Held*, that the corporation, and those claiming under it, are precluded from objecting to the contents of the paper, as at least *prima facie* evidence, upon the ground that it does not come up to the requirements of the law.

IDEM—SEAL.—*Held*: that as the paper on file bears the impression of the corporate seal, *prima facie*, it proves the seal of the corporation.

IDEM—POWER OF SECRETARY TO AFFIX CORPORATE SEAL.—The secretary of a corporation is the proper custodian of the corporate seal, and when the secretary affixes it to a mortgage, or other instrument, the presumption is, he did it by the direction of the corporation, and it devolves upon those who dispute the validity of the deed, to prove that he acted without authority.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Thomas E. Hayden, for Appellant.

I. The power to sell and convey is ample so far as the facts are in question, and the power of sale is operative, without foreclosure. (*Fogarty v. Sawyer*, 17 Cal. 592-3; 4 Kent, 146; Hill on Mortgage, chap. 7; *Longwith v. Bulls*, 3 Gilm. 32; 23 Cal. 573; 27 Cal. 272; 36 Cal. 60.)

II. The acknowledgment before the vice-consul was valid. (16 Cal. 551 to 654, and cases there cited.)

The use of the corporate seal on a deed proves *prima facie* that the officers had authority to execute it; and both seal and authority are presumed by the court on the slightest waiver of objections. (*Sharon v. Minnock*, 6 Nev. 381; *Hoyt v. Thompson*, 3 Sandf. 416; *Morris v. Wadsworth*, 17 Wend. 103; *Thurman v. Canevon*, 24 Wend. 87.)

III. Proof of signatures of officers of corporations is *prima facie* evidence of the due execution of a deed by them. (Abbott's Digest, Law of Corp., p. 272, secs. 30, 31, 32, 33.)

The seal of the corporation proves the authority of the officers to affix it. (Abb. Dig. Corp., p. 725, secs. 31-3, and cases there cited; 1 Withron's Amer. Corp. cases, 645.)

Where a deed appears duly executed with seal attached, the presumption *omnia vita acta* applies. (Grant on Corp., top page 78, and note c thereunder; 11 Adolphus & Ellis, 502.)

Robert M. Clarke, for Respondent, argued the case orally.

By the Court, BEATTY, J.:

This is a suit for the recovery of certain parcels of land situate in Washoe county. The defendant, as one of his defenses to the action, alleges that the land is the property of the Nevada Land and Mining Company, limited, a corporation, and that he is in possession under a contract with that company for the conveyance of the premises to him. This plea, of course, is evidence in favor of the plaintiff of the existence and title of the corporation, and in order to make out his *prima facie* case, it was only necessary for him to show a conveyance from the corporation to himself.

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This he undertook to do; but his evidence, offered for that purpose, was excluded on the objection of the defendant, and judgment of nonsuit rendered. The plaintiff appeals from the judgment, on the ground that the court erred in excluding the evidence referred to, and the only question to be decided is, whether that evidence was competent and sufficient to prove a conveyance of the land from the corporation to the plaintiff.

The deed to the plaintiff was executed by one Story, claiming to act as the attorney in fact of the corporation and of the trustees named in two mortgages or deeds of trust of the corporation, by which the trustees are empowered, in case of default of payment of the indebtedness secured by the mortgages, to sell the mortgaged premises. The only objection to this deed executed by Story, as attorney, was that his authority was not proved. To show his authority, the plaintiff offered in evidence copies from the records of Washoe county of the two mortgages above mentioned, of a power of attorney from the corporation to Story, and of powers of attorney from the trustees named in the mortgages to Story. The objections of the defendant to the introduction of these papers raise a number of questions, the first of which is one of construction, viz.: Did the trustees have the power to sell without foreclosure? We understand it to be well settled that a power to sell without foreclosure is operative when the intention to confer it is clearly expressed, and in these mortgages the power is conferred in the plainest and fullest terms, coupled with a provision that purchasers from the trustees shall not be required in any case to prove that the conditions have arisen under which the trustees are authorized to sell. There can be no doubt, if the execution of the various powers under which Story claimed to act was sufficiently proved to entitle them to be admitted in evidence, that the plaintiff proved his case. Whether their execution was so proved or not, depends upon the validity of the objections taken by the defendant at the time they were offered. His first objection was that the absence of the originals was not sufficiently accounted for. But the proof showed that

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the corporation was an English corporation, that the trustees and Story, the attorney, were residents in England, and that the papers were in England. They were out of the power of the plaintiff, and beyond the reach of the process of the court, so that secondary evidence of their existence and contents was admissible, without regard to the provisions of the recording act.

The next objection of the defendant was "That there was no proof of the authority of the officer before whom the acknowledgments of said mortgages and power of attorney from said company were taken, to take such acknowledgments."

The acknowledgments of all these instruments are certified by the vice-consul general of the United States at London, under his official seal. His authority to take and certify acknowledgments of conveyances of real estate is established by the statute (Sec. 231 of the Compiled Laws). This section of the law was borrowed along with the rest from the State of California, and was, of course, taken with its known construction. In the case of *Mott v. Smith* (16 Cal. 552), it was decided that the certificate of a vice-consul of the United States residing in the Sandwich Islands was of itself *prima facie* evidence of the execution of a deed. So in this case, the certificate of the vice-consul at London is of itself evidence, so far as it is made in compliance with the law. There is no objection to the form of his certificates of the acknowledgment of the powers of attorney from the trustees to Story, but with respect to the deeds of the corporation, it is objected that the certificate of the vice-consul affords no proof, and that there is no other proof that the seal attached to those deeds was the common seal of the corporation; or that the parties by whom it was affixed and the name of the corporation subscribed had any authority from the corporation to execute the deed. This objection will be better understood by reference to the language of one of the certificates, which is as follows:

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“CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, }
LONDON, England. }

“On this sixteenth day of June, in the year of our Lord one thousand eight hundred and seventy, before me, Joshua Nunn, Vice-Consul General of the United States of America for London and the dependencies thereof, personally appeared Edward Clavery Griffiths and Sir John Campbell Lees, Knight, directors, and John Abel Robertson, secretary of the Nevada Land and Mining Company (Limited), known to me to be the persons described in, and who for and in the name of the Nevada Land and Mining Company (Limited), executed the foregoing instrument, and acknowledged to me that they executed the same freely and voluntarily as and for the act and deed of the said Nevada Land and Mining Company (Limited), and for the uses and purposes therein mentioned.”

The certificate to the power of attorney from the corporation to Story is fuller, or at least more explicit, than this in some respects; that is, the vice-consul certifies explicitly that the persons subscribing are directors and secretary of the company, and that the seal annexed is the corporate common seal of the company. The same objection, however, is made to all the certificates: that the statement of the vice-consul is no evidence of the genuineness of the seal or of the authority of the persons who affixed it. These objections present a number of important questions: How must the execution of a corporation deed be acknowledged or proved in order to entitle it to record? Will the same proof which entitles it to record entitle it to be read in evidence, or must the seal or the authority of those who affixed it be proved *aliunde* like the authority of an attorney in fact? Ought the person executing a deed in behalf of a corporation by affixing its seal to “acknowledge” the execution, or ought he or a subscribing witness to “prove” it, by swearing to the identity of the seal, and that it was affixed by one having the custody of it, or one specially authorized?

All these, and, perhaps, other questions, are raised by

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the defendant's objections; but in the view we entertain of the case it becomes unnecessary to decide them, and as they have not been very fully argued, we prefer not to do so. Disregarding the certificate of acknowledgment of the execution of the two mortgages, altogether there is still sufficient evidence to prove, *prima facie*, that they are the deeds of the corporation. An act of the legislature of this state, approved March 3, 1869, (Stats. of 1869, p. 115,) requires all foreign corporations to file, in the office of the county recorder, of each county, in the state wherein they are engaged in carrying on any kind of business, a properly authenticated copy of their certificate or act of incorporation, with a duly certified list of its officers appended. The intention of this act was obviously to compel foreign corporations, doing business in this state, to furnish easily accessible evidence of their existence, and of the names of their officers. The pleadings in this case establish, as against the defendant, the existence of the Nevada Land and Mining Co., Limited, and the fact that it is transacting business in Washoe county. It is, therefore, to be presumed that it has filed in the recorder's office of Washoe county, the papers which it is required to file by the law above cited.

On the trial, the plaintiff offered in evidence a paper, which, it was proved, had been filed by the acting superintendent of the company in this state, in attempted compliance with the law. This paper was not such a document as the law required, and was not properly authenticated; but the evidence showed that the filing of it was the corporate act of the company, and we are satisfied that it is a safe and proper rule to hold that the corporation, and those claiming under it, are precluded from objecting to the contents of that paper as at least *prima facie* evidence, upon the ground that it does not come up to the requirements of the law. Taking it then for evidence of what it contains, it proves, among other things, that in August, 1869, John Able Robertson was secretary of the company, and, as it bears the impression of the corporate seal, it proves the seal of the company. The testimony of the witness, Fish, proves that a *fac simile* of that

Points decided.

seal was affixed to the two mortgages above referred to, the originals of which he had seen and recorded; and altogether the proof amounts to this: That Robertson, the secretary of the company, put its seal to the first mortgage. If the law of England is the same as our own (and we can presume nothing else), Robertson was the proper custodian of the corporate seal, and when he affixed it to the mortgage the presumption is, he did it by the direction of the company, and it devolves upon those who dispute the validity of the deed, to prove that he acted without authority. Our conclusion is, that the plaintiff proved the execution of the first mortgage; that the trustees therein named had power to sell without foreclosure; they empowered Story to sell, and he conveyed to the plaintiff.

The judgment of nonsuit was therefore erroneous, and it is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

[No. 726.]

SOL WEILL, APPELLANT, v. LUCERNE MINING COMPANY ET AL., RESPONDENT.

CHALLENGE TO JUROR—MAIN QUESTION INVOLVED IN THE CASE.—Where a juror stated that he had formed and expressed an unqualified opinion as to the course and direction of one of the mining lodes in controversy in the suit, and it was claimed that the direction of the lode was one of the main questions at issue: *Held*, that as it was impossible for the court to determine from the pleadings or facts before it whether this was one of the main questions involved, it was the duty of the appellant to have at least offered to prove, by some competent evidence, that it was one of the main questions involved in the case.

IDEM.—*Held*, that upon the facts of this case, it is not shown that the juror challenged had either formed or expressed any unqualified opinion prejudicial to appellant.

NOTICE OF MINING LOCATION, CONSTRUED.—Where a notice reads that the locators have taken and claim "for mining purposes 1200 feet of ground on the face of this hill, * * * running north 1200 feet from stake, with all its dips, angles and spurs, from thence to the centre of the hill:" *Held*, that the words "with all its dips, angles and spurs" refer to a lode, not to surface or hill claims.

DEED OF MINING GROUND—DESIGNATION OF THE NAME OF THE CLAIM.—Where a party conveys all his right, title and interest in and to certain

Argument for Appellant.

mining ground and quartz lode described in the deed, and it appears as a fact that his interest was derived from two different notices of location which were posted upon and claimed the same lode: *Held*, that the conveyance of his interest in the lode necessarily conveyed his interest under both locations, and it was immaterial by what particular name he designated it. (*Phillips v. Bladell*, 8 Nev. 61, affirmed.)

IDEM—How CONSTRUED.—Where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the ground in the deed, by courses, distances, or monuments, it cannot be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known.

SECOND LOCATION OF MINING GROUND WHEN NOT AN ABANDONMENT OF THE FIRST—Where one or more of the parties first locating mining ground afterwards make a second location upon the same lode, with the names of other parties added to the notice of location, it appearing that at the time of the second location the ground was undeveloped, and it was not known that both notices were upon the same lode, and it further appearing that the second notice was posted for the express purpose of protecting the original location: *Held*, that the second location did not of itself constitute an abandonment of the first location.

IDEM—The question of abandonment is one of intention. Whether it was the intention of the locators in the first notice to abandon their interest in the ground derived from said first notice of location, was a question of fact for the jury to determine from all the facts and circumstances of the case.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

Lewis & Deal, for Appellant.

I. The court erred in disallowing the challenge to the juror, Mathewson. The law guarantees to all persons not only impartial jurors, but also jurors who have not prejudged the case: in other words, jurors who have not formed or expressed an opinion as to the material issue in the case. The statute says a person is disqualified who has formed or expressed an opinion as to the merits of the action or the main question involved. (Sec. 1225, Comp. Laws.) This language is very clear and hardly calls for construction. What then is the merits of the action, or the main question

Argument for Appellant.

involved? It is not, certainly, as contended by counsel in the court below, that one party or the other is absolutely entitled to recover in the suit. If such be the law, no man is disqualified unless he has formed an opinion as to the law of the case as well as the facts. He might have a fixed opinion as to the facts in a case and still not be disqualified if he had not such an opinion as to the law to govern the facts. Such, certainly, cannot be the law. The object of the statute, as well as the common law, is to give every man a jury who will decide, not according to an opinion already formed, but according to the evidence which may be adduced at the time; and to secure this right, it esteems no man qualified to act according to the evidence who has a fixed opinion before he hears it. So there may be many main questions in a case. Any question of fact which may determine the issue is clearly a main question. A defendant may have many defenses to one action brought against him, either one of which may go to the whole merit of the case, and if found in his favor, may entitle him to a verdict. Can it be said that any one of such defenses does not constitute the main question involved? If a jury should be impaneled with a fixed opinion as to any of such defenses, surely such jury would not be capable of deciding according to the evidence. We contend, then, that a juror is disqualified who has formed an unqualified opinion as to any main fact constituting the cause of action, or the defense.

II. The court erred in refusing to give our instruction to the effect that the title to the Boston ground did not pass, unless the grantor intended to convey, and the grantee to take that ground. This instruction was pertinent to the issue, because the deed under which the defendant claims title, did not mention the Boston ground as that intended to be conveyed, but refers only to the Lucerne location; and the defendant, for the purpose of claiming that ground under the deed, put in evidence to show that the Lucerne location covered the Boston. To rebut this evidence, and to show that the locators themselves had treated the claims as separate and distinct, we introduced deeds from various locators in the Boston, which clearly showed that the two

Argument for Appellant.

claims were not identical; one of these deeds describing the Boston as being bounded on the north by the Lucerne, a thing that could not be if the claims were the same. Now, such being the case, it was quite proper to submit the question of intention to the jury; for, surely, if the grantor did not intend to convey ground not mentioned, nor the grantee to purchase, then, surely, such ground did not pass, for the intention of parties is the very life of all contracts, and must always govern. (2 Parsons on Cont. 6 Ed. 494—note; 9 Wallace, 50; 1 Greenleaf, sec. 287; 1 Greenleaf on Evid., sec. 286-7 288,—note.

If proof of the intention of parties was admissible at all, it was then certainly necessary to give the instruction; for, in all cases where extraneous evidence is admissible to determine what is intended to be conveyed, the jury should pass on the question. (1 Greenleaf on Evidence, sec. 288, note b; *Merrill v. Firth*, 3 M. & W. 402; *Moore v. Sarwood*, 4 Ex. 681, 5 Ex. 163-4; *Foster v. Mutual Life Ass. Co.* 3 E. & B. 48; *Macbeth v. Hukleman*, 1 Tenn. 182; *Smith v. Thompson*, 8 Com. Bench, 44, 17 Penn. 514; *Merrill v. Weymouth*, 28 Vt. 824.)

III. The court erred in refusing our instruction to the effect that the Surrhyne deed did not carry the Boston ground. The Boston was simply and solely a hill location. The notice itself is conclusive on this point. It claims upon the face of the hill, twelve hundred feet, and in to the center of the hill. No mention whatever is made of a ledge; and it is known that such locations were common both here and in California. The fact that no ledge location is mentioned in the notice is very strong evidence that it was not intended; but it would seem conclusive that no such intention existed, when it is seen that the location was upon the face of the hill, and in the center. Certainly, no man, intending to make a location of a ledge, would have used any such language as that employed in this notice. Again, when the same parties afterwards desired to locate a ledge, that is, the Lucerne, they expressly mentioned the ledge as the location made. So, too, the fact that the same parties who located the Boston afterwards located the Lucerne, with no

Argument for Respondents.

better reason for so doing than that they wanted to protect themselves and wished more ground, shows very conclusively that they themselves did not regard the Boston location in any other light than that of a hill claim.

IV. If the Boston was a ledge location, then the court erred in refusing to charge the jury that the locators of the Boston ledge abandoned the Boston title, by a new location of the same ground. The Boston locators having, in the re-location, under the name of the Lucerne company, taken in other parties, necessarily abandoned their former location. It is very clear that the two locations could not exist together. The locators of the Boston certainly could not, as against the parties taken in by them in the new location, assert their prior location of the ground under the name of the Boston. By the new location they all became tenants in common; not by any conveyance, but by a location really made by the Boston locators themselves. It seems to us manifest that the new location, as it included more ground and more locators, and was, in fact, a new company, operated as a destruction of the Boston location.

Mesick & Seeley, for Respondents.

I. The terms of the Boston notice are not only sufficient to include a ledge, but it in terms claims "dips, spurs and angles," and is more comprehensive in its terms than the location notices of many of the most important ledge claims in the Virginia mining district, as well as the Gold Hill district, and which have been held by the district court as valid, and sufficient for acquiring title to a ledge. And besides, the testimony shows that the Boston locators claimed a ledge, prospected for a ledge, and worked a ledge under this notice.

II. The answers of the juror Mathewson did not show that he had formed or expressed any unqualified opinion or belief, either as to the merits of the action or the main question involved therein, but the contrary. Upon his whole examination no court could say that he was incompetent, under the statutes, to act as a juror. The belief or idea which Mathewson said he entertained could not then be deter-

Argument for Respondents.

mined to be, and never was, of the merits of the action, or the main question involved. It was simply a vague notion how the claim and ledges lay and ran in the neighborhood where lay the ground in controversy. But a full answer on this point likewise is found in the fact that Mathewson did not sit in the jury, but was challenged peremptorily by plaintiff, and there is no fact stated in the record showing that plaintiff used more than two of the four peremptory challenges which the statute gave him. (*Fleeson v. Savage Silver M. Co.*, 3 Nev. 160-172.)

III. The intention of the parties to a deed cannot be considered in opposition to the plain meaning of the words used in a case like this. The jury had nothing to do with the question of the intention of the parties to the deeds. The legal effect of the deeds was a question for the court. (*Carpenter v. Thurston*, 24 Cal. 268.)

Whether the deeds did or did not carry the Boston title, depended simply upon the terms of the deed, and the fact of the Boston and Lucerne locations both being on the same ledge.

IV. The court did not err in refusing to instruct the jury that the legal effect of the Surrhyne deed was not to pass the Boston title. That depended upon the fact whether both the Boston location and the Lucerne location were on the same ledge, for if they were, Surrhyne being an owner in both locations, a conveyance by him of the ledge, by either name, would necessarily carry both his titles. (*Phillips v. Blasdel*, 8 Nev. 61.)

V. The court did not err in refusing to instruct the jury that the legal effect of the location of the Lucerne claim by those interested in the Boston location was an abandonment of the latter. There is no rule of law which could justify the giving of any such instruction. The fact that both locations were on the same ledge, was not proved till long after both locations had been made, nor till extensive explorations had been made. "It is very clear" that both locations on the same ledge could exist together. When the discovery was afterwards made that both locations were on the same ledge, or even immediately upon the making

of the Lucerne location, the Boston owners would still retain their older title, and stand invested with the Lucerne title to the ground covered by the Lucerne location, and not embraced in the Boston location. The idea seems a little strange, that by acquiring two titles to the same ledge the Boston locators forfeited the ledge to parties not in any way in privity with either location.

By the Court, HAWLEY, C. J. :

This is an action of ejectment instituted in pursuance of an act of Congress, to determine the right to certain mining ground for which the Lucerne Mining Company had applied for a patent, and appellant had filed his protest.

The appellant claims title to the mining ground in controversy, under the mining location and claim known as "Waller's Defeat." The respondents claim title under the mining locations and claims known as the "Boston" and the "Lucerne;" the former having been located prior, and the latter subsequent, to the location of the "Waller's Defeat." The jury found a verdict in favor of respondents. Appellant moved for a new trial, and from the order overruling that motion this appeal is taken.

Several points are presented and relied upon by appellant, which will be noticed in their regular order.

1. It is claimed that the court erred in refusing appellant's challenge to the juror Mathewson, upon the ground that said juror had formed and expressed an unqualified opinion as to the course and direction of the Waller's Defeat lode. Appellant claimed at the time of the challenge, and still insists, that this was one of the main questions involved in the case, and that under the provisions of the sixth subdivision of section 164 of the Civil Practice Act (1 Comp. L. 1225), the court should have allowed the challenge. Mathewson, upon his *voire dire*, stated that he was well acquainted with all the mining claims in the locality of the mining ground in dispute; that he had a decided opinion as to the course of all the claims in that vicinity; that he knew nothing at all about the merits of the case; that he had no opinion upon the question as to whether or not the

Waller's Defeat and the Lucerne claims were on the same lode, and no opinion as to whether there was more than one lode. "If," said he, "there are two or three ledges there, I have an idea where they run."

Upon the trial of this cause, there was some controversy as to the course of the various claims. There was testimony offered by respondent tending to prove that the Waller's Defeat ran with a certain cañon; also, testimony offered by appellant tending to prove that it ran over a hill almost at right angles with the cañon. Without deciding the question as to the meaning of the statute, we are of the opinion that the action of the court in refusing the challenge must be sustained upon two grounds: First. It was impossible for the court to determine from the pleadings or facts before it, at the time the challenge was interposed, whether the course of the lode, or lodes, was, or was not, one of the main questions involved in the case. If appellant desired to present the point upon its merits, he should, in the absence of an admission upon the part of the respondent, at least, have offered to prove by some competent evidence that this was one of the main questions involved in the case. Second. From the answers given by the juror, it seems to us apparent that he was of the opinion that the vein, or veins, of ore upon which the respective claims were located ran in the same general direction; otherwise he would certainly have had an opinion as to whether or not there was more than one lode in that locality; and also an opinion as to whether or not the Lucerne and Waller's Defeat were upon the same lode. In reply to the questions asked upon this point, he answered in the negative. If his answers were truthful, is it not clear that he could not have formed the opinion, as argued by appellant, that the Waller's Defeat ran with the cañon, and that the Lucerne ran over the hill nearly at right angles with the cañon? For if that was a fact, the claims could not be upon the same lode. The juror having an opinion as to the general direction of the two claims, if he believed they run at right angles, as a matter of course, must have entertained the opinion that they were not upon the same lode. We think it must have

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been as apparent to the court as it is to us from all the answers given by this juror that his opinion was a general one as to the course of the vein, or veins, of ore; that his opinion was that the vein, or veins, of ore ran in the same general direction; but whether there was but one lode, or whether the Waller's Defeat and the Lucerne were upon the same lode he had no opinion. The juror entertained no opinion upon this point prejudicial to the appellant, and the court did not err in refusing the challenge.

2. At the close of the testimony offered on behalf of respondents, appellant moved the court "to strike out as immaterial and irrelevant all the testimony * * * relating to the location of the Boston claim and the work done under that location; also, the notice of location of the Boston Company." The court refused to grant said motion. It is argued that the title claimed by respondents is to a lode; that the Boston notice did not claim a lode, but was what is known as a hill claim; that the only controversy in this action is as to the title to a lode, and that no title to the lode can be acquired from a hill location. The notice of the Boston location reads as follows:

"Notice is hereby given that we, the undersigned, have taken up and claim for mining purposes twelve hundred feet of ground on the face of this hill on the south side of Gold Cañon, running north 1200 feet from stake, with all its dips, angles and spurs, from thence to the centre of the hill. 7 June, 1859." (Names of locators.)

A narrow or illiberal view in the construction of written notices of mining locations would often lead to the deprivation of the rights of the locators. In many of the locations made by miners, especially in new mining districts, the notices of location are frequently found to be vague and indefinite. They are often prepared upon the ground, and usually written by men unaccustomed to the forms used by lawyers. A common sense view must be taken of such notices. What was the intention of the parties who made the location? If, in the present case, we seek for that intention from the language employed in the notice, is it not found in the use of the words "with all its dips, angles and

spurs?" In mining parlance these words have a definite meaning. They refer to a lode, not to surface or hill claims. Although the word ledge, lode, or vein, does not appear in the notice, we think, independent of any testimony offered to prove the intention, that the only fair and reasonable construction to be given to the notice is, that it was the intention of the locators to claim a lode with all its dips, angles, and spurs. If the testimony of witnesses is to be considered, the same conclusion is reached. The testimony of Surrhyne, who wrote the notice of location, clearly shows that it was the intention of the locators to take up four claims upon a blind lode, and not to make a hill or surface location.

3. The deed from Surrhyne to the Lucerne Mining Company, under which the respondents claim title, does not mention the Boston notice or claim. It conveys an undivided interest "of all that gold and silver mining ledge or ground * * * more particularly described as follows, to wit: That set of claims known as the Lucerne Company's claims, of 1800 feet in extent, located on the Lucerne quartz ledge. Said company's claims running northerly from a certain shaft sunk upon the lead aforesaid one thousand feet, and running south from said shaft eight hundred feet, * * * being the undivided interest of the party of the first part, in all that original claim located by the Lucerne Company, and duly recorded in the Gold Hill records."

Did this deed convey any title to the ground claimed by the Boston notice of location? It appears from the testimony that the Boston notice was written and posted upon the ground in July, 1859; that thereafter, in March, 1860, the same parties who had located the Boston, using their own names and the names of ten other persons, located the Lucerne, claiming fourteen claims on the Lucerne ledge. The notices of the Boston and Lucerne locations were both written by Surrhyne, the grantor of the deed to the Lucerne Mining Company. The Lucerne notice was posted on a stake at the north end of the Boston claim, and extended "in a southerly direction twenty-eight hundred feet." The testimony offered upon the part of the respond-

ents tended to prove that the locators of said claims fully complied with all the mining laws, rules and regulations of the district, as to amount of work, posting and recording of notices, etc.; that at the time the locations were made, the parties were prospecting for a blind ledge; that the object of the locators in making the Lucerne location was to keep off other parties from making any locations that would be likely to conflict with the Boston, and possibly to get a little more ground; that subsequent developments established the fact that the Lucerne notice covered the same lode claimed by the Boston notice. Upon this state of facts, appellant asked the court to give the following instruction: "You are instructed that the defendants derived no title whatever to the claim located by the Boston company by the deeds introduced in evidence by the defendants, and that no title to the Boston claim has been shown to be in the defendants, or either of them, by such deeds. The only title conveyed by such deeds is that to the Lucerne claim, located in March, 1860." * * * This instruction was clearly erroneous. Surrhyne, the grantor of one of the deeds, was one of the locators in the Boston. He was also one of the locators in the Lucerne. He afterwards conveyed his undivided interest in the lode or ground described in the deed. The deed was a quitclaim deed. By it he conveyed "all his right, title, interest, claim and demand, of, in and to" the lode and premises therein described. If the Boston notice and the Lucerne notice were posted upon, and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest under both locations, and it was immaterial by what particular name he designated it. (*Phillpotts v. Blasdel*, 8 Nev. 61.)

4. Testimony was offered by appellant, in rebuttal of respondent's case, tending to prove that the locators of the Boston claim had treated it as separate and distinct from the Lucerne claim, and several deeds from the various locators in the Boston were introduced in evidence, in some of which the Boston ground was described as being bounded on the north by the Lucerne. The object of this testi-

mony was to show that it was not the intention of Surrhyne at the time of executing the deed, already referred to, to convey his interest in the Boston claim. Upon this point, appellant asked the court to instruct the jury as follows: "In order to reach the conclusion that any title to the Boston claim is conveyed by the deeds introduced in evidence by the defendants, you must believe that the grantors in those deeds intended to convey such claim, and that the grantees intended to purchase it."

This instruction was calculated to mislead the jury. The conclusions we have reached upon other points fully justify the action of the court in refusing to give this instruction. But little need be added to what we have already said. As an abstract proposition of law, it may, for the purpose of the argument, be admitted, that the instruction is correct. It is the intention of the parties that imparts life to every contract, and controls the court in the construction of every written instrument. But how is that intention to be ascertained? When the language of a deed is doubtful, the first thing we inquire is: What was the intention of the parties? But courts do not always seek for the intention of the parties independent of the language used in the deed. On the contrary, we think it is a well-settled legal principle, that where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the grounds, in the deed, by courses, distances or monuments, it cannot be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known. It is only when the language is equivocal, imperfect or ambiguous, and the location of the ground, or identity of the lode, or lodes, made doubtful, that the construction put upon the deed by the parties who located the ground may be resorted to to aid in ascertaining the intention of the parties. The very object of a description in a deed is to define what the parties intended, the grantor to convey, and the grantee to receive, by the

conveyance. That intention, in the present case, is plainly deduced from the language contained in the deed. The description of the ground conveyed is definite: "That gold and silver mining ledge or ground * * * running northerly from a certain shaft sunk upon the lead aforesaid one thousand feet; and running south from said shaft eight hundred feet." It was for the jury to determine whether there was but one lode; whether the Boston notice and the Lucerne notice were posted upon, and claimed the same lode, and whether the description in the deed covered the ground included in the Boston notice? And it was for the court to determine the legal effect to be given to the deed. If it was admitted that there was but one lode, that both notices of location were on that lode, and that the ground located by the Boston company was within the limits of the ground conveyed, it seems to us too clear for argument, that the effect of the language used in the deed was to convey the grantor's interest in that lode, from whatever locations it may have been acquired, or by whatever name it may have been designated.

5. Finally, it is contended that the court erred in refusing to give this instruction: "The jury are instructed that if they believe from the evidence that the locators of the Boston claim re-located the Lucerne claim upon the same ledge as that which they claimed under the notice of location of the Boston company, commencing at the north stake of the Boston claim and claiming 2800 feet, including the ground claimed by the Boston company's notice, such re-location is an abandonment of the Boston claim, and they must exclude from their consideration the Boston claim and all work done under it."

This instruction presents the simple question whether, as matter of law, the fact of making a second location upon the same lode with the names of other parties included in the notice of location, is an abandonment of the first location. The answer to this is plain. The question of abandonment is one of intention. Whether it was the intention of the original locators of the Boston claim to abandon their interest in the ground derived from the Boston notice of loca-

Points decided.

tion and the work done under it, was a question of fact for the jury to determine from all the facts and circumstances of the case. It is sometimes difficult in new mining districts, the mining ground being undeveloped, and the course of the croppings, if any, not being clearly defined, to determine the direction of the lode, or to determine the fact whether or not there is but one lode. We believe it is not an uncommon practice for miners in making locations under such circumstances, to post one or more picket notices of location as a protection to the original claim, to keep off other parties from making any locations that would be liable to interfere with the first location. Now when the developments establish the fact that the subsequent notices were really posted on the same lode as the first, it seems to us, in the absence of any mining law, rule or regulation of the district, that such an act shall work a forfeiture of the rights of the locators under the first notice, that the argument advanced by appellant that a second location made under such circumstances, for the express purpose of protecting the original location, of itself, constitutes an abandonment of the first notice, is illogical and unsound.

We are not called upon in this case to determine what, if any, rights were acquired by the second notice of location; or the rights, if any, of the additional locators in the second notice, and upon these questions we express no opinion.

The judgment of the district court is affirmed.

Mr. Justice BEATTY concurred in the judgment.

[No. 785.]

A. W. MAXWELL, PETITIONER, v. HENRY RIVES, RESPONDENT.

INQUIRY UPON CERTIORARI.—The inquiry upon certiorari must be confined to the simple question whether the respondent exceeded his jurisdiction in making the orders complained of.

DEPOSITION OF A PARTY CONFINED IN JAIL.—A party to a civil action has the right to take the deposition of his adversary whether he is in or out of jail.

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12	187
13	222

Argument for Petitioner.

IDEM—ORDER OF JUDGE—SECTIONS 1459, 1460 AND 1461 CONSTRUED.—The law requiring an affidavit to be made of certain facts before the court should make an order to have the party in jail produced in court, was never designed for the protection of the prisoner, but only to prevent improper and unnecessary interference with the custody of prisoners.

IDEM.—If the order for the prisoner's attendance in court was improvidently granted, it is no concern of the prisoner, being before the court he was bound to answer any question that he would have been required to answer if the process for bringing him there had been strictly pursued.

IDEM—CONTEMPT OF COURT—REFUSAL TO ANSWER QUESTIONS.—If the witness refused to answer questions when the court decided he should answer, it was a contempt and punishable as such. The prisoner might have put himself upon his privilege not to criminate or degrade himself, but he expressly disclaimed this excuse, and was therefore bound to answer the questions, or he was liable to be punished for contempt.

CONTEMPT OF COURT—PENAL STATUTE.—The statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions.

IDEM—JURISDICTION TO IMPOSE SENTENCE.—Petitioner was asked a number of questions, all being addressed to the same point, which he refused to answer. The court found him guilty of a separate contempt for every question that he refused to answer: *Held*, that in refusing to answer, the petitioner was guilty of but one contempt, and that the court had jurisdiction to impose but one sentence.

THIS was an original proceeding in the supreme court upon a writ of certiorari.

The facts are stated in the opinion.

A. B. Hunt, J. C. Foster, and T. W. W. Davies, for petitioner.

I. The court had no power to make any order of any kind whatever, either for the examination of Maxwell or adjudging him guilty of a contempt, or to strike out his answer in the civil action.

The affidavit of Kelly conferred no jurisdiction whatever upon the court to act; it was as though no affidavit whatever had been filed. (Comp. Laws, secs. 1459–61; *State v. Steel*, 1 Nev. 27; *State v. Commissioners Washoe County*, 5 Nev. 317, and cases therein cited; *Morgan v. Commissioners Eureka County*, 9 Nev. 360.)

II. The affidavit shows a want of jurisdiction on the face of the record; and when this appears, no presumption can

Argument for Respondent.

be indulged in to contradict the record. (*Hahn v. Kelly*, 34 Cal. 404 to 408.)

III. It was necessary in the affidavit of Kelly to have set out the facts expected to be proved by the witness, and to have shown their materiality. (*Dodds v. Meadow Valley*, 7 Nev. 148.)

IV. The statute prohibits any examination except upon a proper affidavit. (42 Cal. 58; 8 Nev. 274; 7 Nev. 22.)

V. If the action of the District Court is void for want of jurisdiction it should be set aside. (39 Cal. 571; 9 Nev. 355.)

VI. The power to punish for contempt is arbitrary, and the affidavit must show a case within the statute or fail. (42 Cal. 412-14; 9 Nev. 360.)

VII. Whenever a new right has been created it must be strictly pursued. (5 Cal. 210-11.)

VIII. The order being void, it was no contempt to refuse to answer. (5 Denio, 539; 20 Wend. 208-9.)

IX. Defendant could not be compelled to answer. (1 Greenleaf, sec. 451.)

X. No court has a right to multiply fines in one proceeding. (60 N. Y. 559, case of Tweed.)

Robert M. Clarke, A. C. Ellis and Garber & Thornton, for Respondent.

I. Sections 1459, 1460 and 1461, 1 Comp. Laws, provide the means for getting at a witness who is in custody. The order was to the sheriff. He had the custody of the witness, and he might refuse to let his deposition be taken. To prevent this, and to secure to the moving party his right to the deposition of the witness in custody, these sections were passed. There is no reason why the witness should complain that these provisions were not strictly complied with. They are for the benefit of the moving party, and for the protection of the court and the sheriff, that there might be no useless intrusion upon the custody of the witness which is devolved by the law upon the sheriff.

The witness has no interest in these provisions, and no right to complain if they are not strictly followed. If these

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forms and requirements are not in all respects complied with, and the witness is produced before the officer, he must testify, unless his answer to the question would criminate him.

II. If a party appears to testify, is sworn, and submits to a partial examination, it is too late to move against the order that the affidavit on which it was made did not present a case authorizing the order. (*McCue v. Tribune Association*, Sup. Ct. N. Y., 1 Hun. 470.)

III. The writ of certiorari will not lie. The court had jurisdiction of the case and of the defendant. At the most, this can only be claimed to be an erroneous order, and is open to correction on appeal. There is no question of jurisdiction about this matter. The term is misapplied. It is simply that defendant, being present before the court, committed a contempt in refusing to answer a proper question, without any reason given for the refusal.

By the Court, BEATTY, J.:

The respondent is judge of the seventh district, and this is a proceeding by certiorari instituted for the purpose of reversing his order adjudging the petitioner guilty of contempt of court. The return to the writ discloses the following state of facts:

The Meadow Valley Mining Company sued the petitioner to recover a lot of crude silver bullion valued at \$4000, and he was subsequently indicted by the grand jury of Lincoln county for the larceny of the same bullion. Both cases were set for trial on the same day—October 14, 1875—the trial of the criminal case to take precedence. On the fourth of October the attorney of the Meadow Valley Company gave notice that he would take the deposition of Maxwell in the civil case before the respondent, the district judge, on the ninth of October, and at the same time filed and served the ordinary affidavit for taking the deposition of a party to an action. The petitioner being confined in the county jail under the indictment for larceny, the respondent, as district judge, ordered the sheriff to bring him into open court for the purpose of giving his deposition, and in com-

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pliance with that order the sheriff produced him in court on the ninth of October, and he was sworn as a witness. He was then asked a number of questions, some of which he answered and some of which he declined to answer. Those which he declined to answer were all addressed to the same point, and amounted in effect to this: "How did you become possessed of that bullion?" The grounds specified for his refusal to answer were various, but are all comprised under these heads: First. The proceeding to take his deposition was not authorized by law; and, Second. To answer would expose his defense to the criminal charge upon which he was about to be tried, and so give the state an undue advantage over him. The court overruled these objections and found him guilty of a separate contempt for every question that he refused to answer—ten in all—and imposed ten fines amounting in the aggregate to \$4250. The court also struck out his answer in the case. After an attempted trial of the criminal case, in which the jury disagreed, the petitioner, through his counsel, offered to answer the questions which he had before refused to answer, and thereupon moved the court to vacate the orders fining him for contempt and to reinstate his answer. These motions were overruled. The affidavits filed in connection with the various proceedings in the district court contain a great many allegations intended to prove that the taking of petitioner's deposition in the civil case, before his trial on the criminal charge, was designed for no other purpose than to fish for evidence and discover his defense, so as to put him in the power of "his enemies," meaning thereby the Meadow Valley Company and the district attorney. These allegations, however, cannot be considered. In this proceeding we are not at liberty to extend our inquiry beyond the simple question whether the respondent exceeded his jurisdiction. The motives of those who invoked his action, however wicked they may have been, are entirely beside the purpose, and our decision will be based solely upon the material facts which are above fully set forth.

It will not be necessary either to specify all the particulars of the alleged excess of jurisdiction, as three only of

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his specifications are relied upon by the petitioner, which are:

First. The court exceeded its jurisdiction in ordering the sheriff to bring him out of jail and into court;

Second. In ordering him to be sworn and to answer as a witness; and

Third. In imposing successive or cumulative fines.

The first and second points have been argued and will be considered together. With reference to both it may be said that there is no pretense that the Meadow Valley company would not have had the absolute right to take the deposition of the petitioner on the notice and affidavit filed, if he had not been a prisoner confined upon an indictment for the larceny of the bullion which was the subject of the action; and there is no pretense that the district judge was not the proper officer to take the deposition. The whole argument is confined to the two propositions, that the court could not order the petitioner to be brought out of jail and into court to give his deposition, and that he could not be compelled to testify if his answers would expose his defense to the indictment.

The provisions of the statute relating to the first proposition are contained in sections 1459, 1460, and 1461 of the compiled laws, and counsel for the petitioner contends that a proper construction of those three sections excludes the notion that a prisoner can be brought out of jail in any case for the purpose of giving his deposition. His deposition, it is said, must be taken in jail. He can only be brought before the court for the purpose of testifying orally at the trial. He contends further that if a prisoner can be brought into court in any case for the purpose of taking his deposition, the petitioner could not be so produced in this case, because there was no affidavit filed to show what his testimony was expected to be, or that it was material, as required by section 1460. It is true there was no compliance with the provisions of that section; and there is no doubt that the affidavit filed by the attorney for the Meadow Valley company failed to make out a case for an order to produce the prisoner before the court for the purpose of

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having his deposition taken, even if such an order is proper in any case—a question we think it unnecessary to decide. It seems perfectly clear, however, that the order for his production in court is a matter of which the petitioner is not entitled to complain, and that the jurisdiction of the court to take his deposition did not depend upon the validity of that order. The two things are entirely distinct. A party to a civil action has a perfect right to take the deposition of his adversary whether he is in or out of jail. But when he is in jail the aid of a court, or judge, is necessary in order to obtain access to him there, or to secure his production in court. A judge is not bound to make an order for that purpose, and ought not to do so unless the ends of justice require it; and the evidence requisite for showing that the order is necessary is an affidavit setting out the testimony that is expected from the prisoner and its materiality.

But the law which provides for such an affidavit was never designed for the protection of the prisoner, but only to prevent improper and unnecessary interference with the custody of prisoners. The sheriff is responsible for their safe keeping, and the law very properly provides that he shall not be obliged to produce them in court, or admit strangers to see them in jail, unless an important purpose is to be subserved. But when he obeys an order to produce a prisoner in court, although it may have been improvidently granted, it is no concern of the prisoner that his jailer has been more compliant than he was obliged to be. He is actually in court, and, being there, may be sworn as a witness in the same manner as if he had attended in obedience to a subpoena. (Comp. Laws, sec. 1453.) His right to stay in jail is not so sacred as to invest him with any greater privilege than other persons who happen to be present. The order to produce him performs exactly the same function as a subpoena in the case of a witness who is at large, and certainly it would not be contended if a witness has come into court in obedience to a subpoena substantially defective, or improperly served, that he cannot be compelled to testify. It is equally clear that, in this case, the witness

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being before the court, was bound to answer any question that he would have been required to answer if the process for getting him there had been strictly pursued.

This being so, it was for the court to decide what questions he should answer, and even if it erred in its decision upon that matter, it was but an error, and not an excess of jurisdiction. If the witness refused to answer when the court decided he should answer, it was a contempt, and punishable as such. (Comp. L. sec. 1521, fourth clause.)

Even if we had the power to review the rulings of the district court as to the legality and pertinency of the questions which the petitioner refused to answer, our conclusion would be the same. All the questions appear to have been material and strictly relevant, and the petitioner was bound to answer them, unless he chose to put himself upon his privilege not to criminate or degrade himself. But that excuse he expressly disclaimed. His position was, that the law protected him in his assumed privilege of concealing the means by which his innocence was to be made apparent. We are not, however, aware of any such provision in the law. It is true, that in the ordinary course of criminal proceedings, the defendant is enabled to conceal the grounds of his defense until the prosecution has made a *prima facie* case before the jury; but this is merely an incident to the course of those proceedings, and not in any true sense a privilege. As a defendant in a criminal action he can stand upon the presumption of his innocence, and is not bound to offer any defense until a case has been proved against him; but as a party to a civil action his privilege is just the same whether he has been indicted or not: he can only refuse to answer when his answers would tend to criminate or degrade him, and he must himself invoke the privilege. (Comp. L., sec. 1455.) This is the plain rule of the statute, and there is no public policy superior to the rule. To conceal his defense till the day of trial is, no doubt, a valuable privilege to a criminal, for it will often deprive the state of all opportunity of exposing its falsity, but it is difficult to see how it is to benefit an innocent defendant, who relies upon the truth for his vindication, unless it is as-

sumed that the state will suborn false witnesses for the purpose of destroying him.

This disposes of the first two points of the petitioner. The remaining question is: Did the court exceed its jurisdiction in imposing the penalties? The striking out of the petitioner's answer to the complaint of the Meadow Valley company for refusal to testify, was authorized by the express language of the statute. (Comp. L., section 1456.) If the law is constitutional—and there is no suggestion to the contrary—the respondent, in striking it out, certainly did not exceed his jurisdiction. But whether he did or not is not to be decided in this proceeding. The striking out of the answer was an order made in the civil case of the *Meadow Valley Mining Co. v. Maxwell*, and not in the criminal proceeding for contempt. It may, therefore, be reviewed on appeal from the judgment in that case, and consequently cannot be reviewed on certiorari. In one particular, however, we think there was an excess of jurisdiction: The statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. Otherwise, there would be no limit to the amount in which he might be fined. But it is the manifest purpose of the statute to limit the amount of the fine to be imposed for any one contempt of court to the sum of five hundred dollars—a purpose that would be completely frustrated if the court, by repeating or multiplying questions, could multiply contempts. The district judge erred in finding that each separate refusal to answer a question was a distinct contempt; and in imposing fines which, in the aggregate, exceeded five hundred dollars, he exceeded his jurisdiction. I think his order should be modified by remitting all of the fines in excess of five hundred dollars, and the petitioner should have a judgment for his costs.

Opinion of Hawley, C. J. and Earll, J., concurring.

HAWLEY, C. J., concurring:

I concur in the conclusions reached by Justice Beatty upon the first two points discussed. With reference to the other question I am of opinion that in refusing to answer the various questions propounded to him (all being addressed to the same point), the petitioner was guilty of but one contempt, and that the court had jurisdiction to impose but one sentence.

The orders of the court were made subsequent to the taking of the deposition, and are all included in one general order, as follows: "For the refusal by the defendant in not answering the first question propounded in the deposition commenced to be taken on the 9th day of October, A. D. 1875, before the court, and for the contempt in such refusal, it is ordered that the defendant A. W. Maxwell pay a fine of fifty dollars; and for the next refusal to answer and the contempt thereby committed, it is ordered that the defendant pay a fine of one hundred dollars; and for the third refusal and contempt thereby committed, he is ordered to pay a fine of two hundred dollars; and for the fourth refusal and contempt thereby committed, he is ordered to pay a fine of four hundred dollars; and for the fifth refusal and contempt thereby committed, it is ordered that defendant pay a fine of five hundred dollars; and for each subsequent refusal thereafter, and contempt thereby committed, it is ordered that the defendant pay a fine of five hundred dollars each."

Now if there was but one contempt, I think there could be but one valid sentence; and that when the court adjudged petitioner guilty of contempt and ordered him to pay a fine of fifty dollars it exhausted its jurisdiction, and had no further power in the premises. The subsequent orders were, in my judgment, entirely null and void.

I am of the opinion that the judgment should be modified so as to conform to the views I have expressed.

EARLL, J., concurring:

I concur in the judgment as modified by Chief Justice Hawley.

Points decided.

[No. 739.]

STATE OF NEVADA, EX REL., JOHN PIPER, RELATOR,
v. THOMAS GRACEY, ASSESSOR, AND A. J. McDONELL, AUDITOR OF STOREY COUNTY.

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MANDAMUS—COLLECTION OF TAXES—PROCEEDS OF MINES.—The collection of taxes solely due to a county is a question of public concern as well as of private interest, the collection of such taxes involve public duties and public rights.

IDEM—BENEFICIAL INTEREST OF RELATOR.—When the question is one of public rights, and the object of the writ of mandamus is to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; he is interested, as a citizen, in having the laws executed and the right enforced.

IDEM.—A private citizen and a taxpayer has such a direct and special interest in the collection of county taxes as entitles him to move for and prosecute the writ of mandamus to enforce that duty upon the part of public officers.

MANDAMUS A CIVIL REMEDY.—The proceeding by mandamus is a civil remedy, having all the qualities and attributes of a civil action, and is applied solely for the protection of civil rights.

IDEM—PLEADINGS.—The alternative writ and the return thereto are usually regarded as constituting the pleadings in proceedings by mandamus, the writ standing in the place of the complaint, and the return taking the place of the plea or answer in an ordinary action at law.

IDEM.—The rule as declared in *Curtis v. McCullough* (3 Nev. 202), that "it is the affidavit and not the writ, which under our practice is answered," referred to in connection with the rule above stated.

IDEM—WHAT FACTS MUST BE SHOWN.—To justify the issuance of the writ of mandamus, to enforce the performance of an act by a public officer, the act must be one, the performance of which the law specially enjoins as a duty resulting from his office, and an actual omission upon the part of the officer to perform.

IDEM.—The relator must show, not only that the officer has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application.

IDEM.—The court cannot anticipate that a public officer will not perform his duties within the time prescribed by the statute, and an actual default or omission of duty is just as essential a prerequisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of law.

COUNTY COMMISSIONERS HAVE NO POWER TO RELEASE PROPERTY FROM TAXATION.—County Commissioners have no power to discriminate as to the character of the property which should be subject to taxation. That is a question for the legislature, subject to the provisions of the constitution.

Argument for the motion.

THIS was an original application to the supreme court for a writ of mandamus to compel the auditor of Storey county to correct the assessment-roll of the proceeds of the mines for the quarter ending June 30, A. D. 1875, by adding to the tax collectible upon the proceeds of the mines certain taxes levied for school and railroad bond purposes, and to compel the assessor of Storey county to collect the said taxes as other taxes are collected upon such proceeds of mines. The affidavit shows that on the fifth day of April, A. D. 1875, the board of county commissioners of Storey county made an order levying taxes for the fiscal year A. D. 1875. The order levying the tax for county purposes upon all the taxable property within the county of Storey, included the proceeds of mines and mining claims. The order levying the tax for school purposes and for the payment of certain railroad bonds specially provided that: "The tax levied in this section does not include the proceeds of mines and mining claims."

The mine-owners appeared by counsel, and moved to quash the writ upon the grounds stated in the opinion.

J. A. Stephens and Mesick & Seeley, for the motion.

I. Neither the state nor the relator is the "party beneficially interested," or entitled to bring or maintain this proceeding. (Stat. 1869, p. 50, sec. 6; p. 51, sec. 7; Stat. 1873, p. 162, sec. 13; *Morgan v. Cree*, 46 Vermont, 773.)

In cases where the state is allowed to be a party plaintiff in the relation of some one, she is considered only a nominal party and not the real party in interest. (*People v. Pacheco*, 29 Cal. 213; *Browers v. O'Brien*, 2 Cart. Ind. R. 431; *State v. Com'rs. Perry Co.*, 5 Ohio, 502-3; High on Ext. Rem., sec. 430; *Moses on Mandamus*, 194.)

The relator is, in law, considered as the moving party, and the real plaintiff or applicant in the proceeding. The attorney-general is not the relator in any sense in this case. A relator must always appear by the proceedings to be invested with the character of a real party in interest, or no right or title appears in him to commence or maintain the proceeding.

Argument against the motion.

The words of the statute, defining who may institute this proceeding or apply for the writ, imply a limitation and an exclusion of all persons not within the definition. In effect, those words declare that one who is not beneficially interested shall not apply for nor obtain the writ.

The relator must have an interest more specific and tangible than the interest which every taxpayer or citizen has in the enforcement of every statute law. (*People ex rel. County of Contra Costa v. Supervisors of Alameda Co.*, 26 Cal. 641; *Linden v. Alameda Co.*, 45 Id. 6-7; *Tyler v. Houghton*, 25 Id. 29; *Sanger v. Com'rs. of Kennebec*, 25 Maine, 296; *State v. County Judge of Davis Co.*, 2 Iowa, 285-6; *Wellington v. Petitioners, etc.*, 16 Pick. 105; *Heffner v. The Commonwealth*, 28 Penn. 112; *People v. Inspectors, etc.*, 4 Mich. 187; *State v. Haben*, 22 Wis. 667-8; *Rex v. Merchant Tailor's Co.*, 22 Eng. Com. Law, p. 40; 2 Barn. & Adolphus, 115; *High on Ext. Rem.*, sec. 436.)

II. All the facts which are necessary to show the derelictions of duty on the part of respondents and to entitle the relator to the relief sought, must be specifically set up in the affidavit or application, if not in the writ. (*High on Ext. Rem.*, secs. 12, 448, 450, 536, 539; *Mosés on Mand.*, 201, 202; *State v. McCullough*, 3 Nev. 214; *Evans v. Job*, 8 Id. 344; *Chance v. Temple*, 1 Iowa, 179; *Himmelman v. Danos*, 35 Cal. 447-8; *People v. Jackson*, 24 Id. 632-3; 6 Texas, 473; 39 Mo. 388; *Hall v. People*, 57 Ill. 316.)

Lewis & Deal, for Relator, against the motion.

I. The state may always enforce the performance of their duty by public officers, and, in such case, it is a party beneficially interested; especially so when the object of the writ is to enforce the collection of revenue. It is no answer to say that the state has no interest in the tax to be collected. It may not have, and yet it cannot be said that the state has not a direct interest in the performance of duty by every public officer in the state. However, the state is beneficially interested in the collection of all taxes, state, city and county; for a city, as well as a county, is but an integral

Argument against the motion.

part of the state, and all county taxes are really collected in the name of the state, the same as its own taxes.

If the state have no interest whatever, then we claim that Piper is a proper party as relator, in a case of this kind, which is brought to enforce the performance of a duty by a public officer. (19 Wend. 56; 7 Iowa, 390; *People v. Halsey*, 37 N. Y. 344; 36 Cal. 595; High on Ext. Rem., secs. 431-32; *Moses on Mandamus*, 197.)

II. The proceeding by mandamus is, in all essentials, a civil action. (*State ex rel. Curtis v. McCullough*, 3 Nev. 202; *People v. Supervisors of San Francisco*, 27 Cal. 670; 2 Carter, Ind. 423.) There is enough in the petition to satisfy the court that the assessor has heretofore refused to collect the taxes mentioned; and when the peculiar facts of this case are considered, it seems to us the court should issue the writ, even if no dereliction of duty, with respect to the the particular quarter in question, be shown. However, if we are wrong in this particular, then we claim that if the writ can issue to the auditor, it should be rendered effectual by also commanding the assessor to complete the act, only the first step of which is taken by the auditor. When we allege that it is the auditor's duty to do a certain act, to wit: extend the tax, and then allege that he has refused and still refuses to perform it, it is sufficient under any rule of pleading; and after having unqualifiedly *refused* to perform it, he cannot be allowed to come into court and shield himself under the claim that he had still further time to do it. If he refused, for the reason that he had still further time, and intended to perform his duty, he should have so stated. The law presumes, if he absolutely refuses to do an act, and gives no excuse therefor, that he does not intend to do it; that he, in fact, will not even in the future do so.

III. No demand is even necessary when the writ is sought to compel the performance of an official duty. (*Moses on Mand.*, 125, citing 37 Penn. 237, 277; High on Ext. Rem., secs. 13 and 41.)

IV. The law presumes that a public officer has performed his duty until the contrary plainly appears. (4 Keyes, N. Y. 162; 1 Tiffany, 304; Broome's Maxims, 943-4; 12 Wheaton,

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69-70; 1 Phil. on Ev., secs. 642, 598-note, 500-note; 23 Cal. 114; 24 N. Y. 86; 7 N. Y. 466; 19 Johns. 345.) And when the law presumes the existence of a fact, or that an act has been done, it need not be pleaded. (1 Chitty, secs. 220-21; Stephen on Pleading, 1st Ed., 358.) Hence, if the law presumed that the assessor did his duty, it presumed that he delivered the roll to the auditor on the day he was required to do so; and therefore, under the authorities, no allegation that it was done was necessary.

By the Court, EARLL, J.:

The first question presented by the motion of respondents to quash the alternative writ of mandamus, issued in this case, is whether either the state of Nevada or the relator is shown, by the affidavit upon which the writ issued, to be the party beneficially interested; and especially whether either is so interested in the collection of the railroad bond tax, mentioned in the affidavit and writ, as to be entitled to institute this proceeding for the collection thereof.

By section 448 of the civil practice, it is provided: "This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested." It is contended on behalf of respondents, that, inasmuch as the funds to be raised by the taxes in question are to go into the county treasury and to be disbursed by the county officers, instead of going into the state treasury to be disbursed by state officers, that the state has no beneficial interest in the subject matter of the application; or, at least, "has no other interest than she has in the enforcement of any law admittedly passed for the exclusive benefit of some private citizen, or some private or municipal corporation."

It is a settled rule that where private interests only, or chiefly, are concerned, and the state is only the nominal party, the relator, who is the real party in interest, must show that he, as an individual, is entitled to the relief sought. But we are of opinion this is a question of public concern as well as of private interest. It relates to the

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collection of taxes imposed by the authority of public statutes enacted by the sovereign power of the state, and the money, when collected, is received by the county in its public political capacity, to be applied by the officers of the county to the specific public purposes designated in the respective statutes which provide for its levy and collection. In fact, all taxes imposed for county purposes emanate from state authority, and the collection thereof can only be enforced in the name of the state. Both the levy and collection is the action of the state, operating through the instrumentality of its county organizations. Counties are but integral parts or local sub-divisions of the state, instituted merely as means of government, and they, and the officers thereof, are but parts of the machinery that constitute the public system, and designed to assist in the administration of the civil government. (2 Kent's Com. 275. *Mayor & C. C. of Balto., Garn. of Brashears, v. Root*, 8 Md. 95; *State to the use of Washington County v. B. & O. R. R. Co.*, 12 Md. 436; *Mayor of Balto. v. State*, 15 Md. 376; *Hamilton County v. Mighels*, 7 Ohio Stat. 109.) In the last case cited, Brinkerhoff, J., delivering the judgment of the court, states the distinction between municipal corporations proper and county organizations, thus: "As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them.

"Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of mili-

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tary organization, of means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

It therefore follows that the levy and collection of the taxes in question involve public duties and public rights, and in all such cases, though the state is regarded as the real party in interest, it must necessarily act through individual information, by some public officer or upon the relation of some private individual. (*People v. Collins*, 19 Wend. 56.)

In this case the application is by a private citizen and taxpayer of Storey county, and it is contended, by the counsel for respondents, that a private citizen has no right to apply for the writ of mandamus to compel a public officer to perform an omitted duty unless he shows a special interest in the subject-matter distinct from that of other citizens, and that the relator fails to show that he has any other interest in the levy or collection of the taxes in question than that which every other resident or corporation may have, and therefore is not entitled to apply for or prosecute the writ. Upon this proposition there is an irreconcilable conflict in the decisions of the courts of the different states. In Maine, Massachusetts, Pennsylvania, Michigan, and California, they fully support the position of respondents, and hold that to entitle a private citizen to move for and prosecute the writ, he must show that he has some private or special interest to be subserved, or some particular right to be pursued or protected, independent of that which he holds in common with the public at large, and that "it is for the public officers to apply when public rights alone are to be subserved." (*Sanger v. County Commissioners of Kennebeck*, 25 Me. 291; *Heffner v. Commonwealth*, 28 Pa. 108; *Wellington's Petitioners*, 16 Pick. 87; *People v. Regents of University*, 4 Mich. 98; 45 Cal. 607.)

But we think the better and more reasonable rule is established by the decisions of the courts of New York,

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Ohio, Indiana, Illinois, and Iowa, which hold the opposite doctrine, and maintain that when the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result, it being sufficient if he shows that he is interested, as a citizen, in having the laws executed and the right enforced. (*People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 344; *State ex rel. Huston et al., v. Commissioners of Perry County*, 5 Ohio, 497; *The County of Pike v. The State*, 11 Ill. 202; *City of Ottawa v. The People*, 48 Id. 233; *Hull ex rel. v. People*, 52 Id. 307; *Hamilton v. The State*, 3 Ind. 452; *State v. County Judge of Marshall County*, 7 Iowa, 186.)

We are, however, of opinion that the relator has a direct and special interest in requiring the taxes in question to be collected, and even upon the authority of the first of the above cited cases, assuming it to be the duty of respondents to disregard the order of the board of county commissioners excepting the proceeds of mines from the payment of the taxes levied for school and railroad bond purposes, to extend the amount levied for said purposes upon the assessment-roll of the proceeds of mines, that he is a proper party to move for and prosecute the writ. The constitution provides that: "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation of all property, real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed." It would seem to require no argument to prove that if the proceeds of mines and mining claims are exempt from the payment of their relative portion of the taxes levied for school and railroad bond purposes, that the ratio of taxation must necessarily be increased upon other kinds of taxable property, and the owners thereof would be compelled to contribute more than their due share toward the public burdens, hence the relator, being a citizen and taxpayer of Storey county, is manifestly interested in requiring that the

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proceeds of mines and mining claims within the county bear their equal and just proportion of the taxes imposed.

The remaining question to be considered relates to the sufficiency of the affidavit upon which the application for the mandamus was founded. It is contended on behalf of respondents that the affidavit does not state facts sufficient to authorize the issuance of the alternative writ, or to make it peremptory.

It is claimed on the part of respondents that to authorize the issuance of the alternative mandamus, or to make it peremptory, it was incumbent upon the relator to set forth specifically, in his affidavit or application, all the facts which are necessary to show the dereliction or omission of duty on the part of respondents, and to entitle the relator to the relief which he seeks.

We do not understand the counsel for the relator as controverting this well settled legal proposition, but they insist that, notwithstanding the facts are to be specifically set forth as claimed by respondents, yet the proceeding by mandamus is, nevertheless, "in all essentials, a civil action," and that the sufficiency of the affidavit is to be determined by the rule prescribed by the civil practice act of this state governing pleadings in ordinary civil actions, and, therefore, the facts stated are to be liberally construed.

Although the remedy by mandamus is prosecuted in the name of the state upon individual relation or information, and instituted for the purpose of enforcing the due performance of official duty, and is said, "to partake somewhat of a criminal nature," yet the proceeding is uniformly declared by the courts to be "a civil remedy having all the qualities and attributes of a civil action," and is applied solely for the protection of civil rights. (High's Ex. Rem., secs. 8, 430; *Moses on Mandamus*, 14, 194; *Brower v. O'Brien*, 2 Carter, 423; *McBane et al. v. The People*, 50 Ill. 503; *The State ex rel. Byers v. Bailey, County Judge*, 7 Iowa, 391; *Judd v. Driver*, 1 Kan. 455.) Besides, in this state, the proceeding by mandamus is provided for by, and constitutes a part of, the provisions of the civil practice act, and section 37, which declares that: "All the forms of pleadings

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in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed by this act," manifestly refers to the pleadings in cases of mandamus as well as to the pleadings in other actions or proceedings provided for by the act.

The alternative writ and the return thereto are usually regarded as constituting the pleadings in proceedings by mandamus—the writ standing in the place of the declaration or complaint, and the return taking the place of the plea or answer in an ordinary action at law. This court, however, in the case of *Curtis v. McCullough* (3 Nev. 202), declared that "it is the affidavit, and not the writ, which under our practice is answered." If this is a correct view of the practice under the statute of this state, it follows that the affidavit upon the writ issues, and the allegations of which are to be answered, is to be regarded in the nature of the complaint in an ordinary civil action. But whether it is the affidavit or the writ which the statute requires to be answered, there can be no doubt that, for the purposes of this motion, the affidavit performs the office of a complaint, and the sufficiency thereof is alone to be considered. (Civil Pr. Act, sec. 456.)

The question, therefore, recurs whether the affidavit, considered in the nature of a complaint in an ordinary civil action, and tested by the rule prescribed by the practice act, states facts sufficient to entitle the relator to the relief which he seeks.

Section 39 of the act declares that the complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language." This provision of the act is uniformly construed by the courts to mean that the plaintiff must set forth in his complaint, specifically, every fact in an issuable form, which is necessary to establish his right of action, or which, if admitted to be true, or not denied by the defendant, will enable the court to grant the relief sought. (1 Van Santvoord's Pl. 215-16, and authorities cited.) It is true, section 70 of the act requires that, for the purpose of determining the effect of a pleading, "its allegations shall be liberally construed, with a view to sub-

stantial justice between the parties.” The effect of this section, in our opinion, is correctly stated in 1 Van Santvoord’s Pleadings, 774, where it is said: “Although the section in question may be in some sense a rule to determine the sufficiency of the pleadings, yet it applies merely to the construction of the language and the terms used, and has no reference to the question of the sufficiency of the facts or matters of substance. It is to be applied, as was the rule under the old system, mainly where words are equivocal and terms and expressions are capable of different meanings.”

Applying these principles and rules of construction to the affidavit under consideration, it seems quite clear to us that the facts therein presented are insufficient to justify the court in awarding the peremptory mandate against either of the respondents.

Section 447 of the civil practice act provides that the writ may be issued “to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

The principle on which the writ of mandamus is issued at common law is well settled by the authorities, and this provision of the statute seems to be but a legislative recognition of the common law rule. To justify the issuance of the writ to enforce the performance of an act by a public officer, two things must concur: the act must be one the performance of “which the law specially enjoins as a duty resulting from an office,” and an actual omission on the part of the respondent to perform it. It is incumbent on the relator to show, not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application. (Tap. on Mand., 10; *Comm’rs of Public Schools v. County Comm’rs of A. Co.*, 20 Md., 449; *State v. Carney*, 3 Kan. 88; *State v. Burbank*, 22 La. An. 298; *State v. Dubuclet*, 24 La. An. 16.)

The rule which is to govern the issuance of the writ is clearly indicated in High’s Ext. Leg. Rem., sec. 12, where it is said: “Mandamus is never granted in anticipation of

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a supposed omission of duty, however strong the presumption may be that the persons, whom it is sought to coerce by the writ, will refuse to perform their duty when the proper time arrives. It is, therefore, incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed, nor does the law contemplate such a degree of diligence as the performance of a duty not yet due."

This proceeding relates to the duties of the respondents in respect to the assessment and collection of the tax on mines for the quarter ending June 30, 1875. By section 2 of the act entitled "An act providing for the taxation of mines" (Stat. 1871, 87), it was the duty of respondent Gracey, as assessor of Storey county, to prepare and complete his assessment-roll for said quarter, on or before the second Monday of August following. And by the provisions of section 107 of the general revenue act (Comp. L., 3219), he was required to attach his certificate thereto, and deliver the same, together with the sworn or affirmed statements provided for by the first of the above-mentioned acts, to the county auditor, "who shall examine said assessment-roll, and ascertain that the assessments therein entered comply with the sworn or affirmed statements relating thereto." This section further provides: "And in case of the neglect or refusal of any person, firm, corporation, association, or company, to give the statement, as herein provided, that that fact is noted as heretofore provided, he shall then proceed to extend on such quarterly assessment-roll, the taxes, as provided in this act, on the proceeds of mines. He shall add up the columns of valuation, as set down in the assessment-roll, and shall prepare a statement (which shall be under oath) of the total number of tons of ore,

quartz or mineral, bearing gold and silver, listed upon said assessment-roll, the total value thereof, the total amount on which the taxes were levied, and the total amount of taxes on the same, which statement he shall immediately forward to the controller of the state." Section 108 provides: "After adding the columns of valuation and extending the taxes, as provided in the preceding section, the county auditor shall attach his certificate thereto, and shall, on or before the fourth Mondays in February, May, August and November in each year, deliver the assessment-roll for the preceding quarter respectively, to the county assessor for collection, and shall charge the assessor with the full amount of taxes levied."

It will thus be seen that extending or entering the amount of the tax levied for any purpose on the assessment-roll of the proceeds of mines, is no part of the duties enjoined upon the assessor, and as the only omission of duty alleged against the respondent Gracey is that "he did not and will not correctly assess or return the total amount of tax due from the mines in his district, the county of Storey," it is evident that neither the state nor the relator has any legal cause of complaint against him. It is true, the form of the assessment-roll prescribed in section 2 of the act of 1871, contains the heading of a column for extending the total amount of the taxes levied; but when the section is read in connection with sections 107 and 108, and section 16 of the general revenue act, it is apparent that that column is designed for the auditor, and not for the assessor.

It is, however, very clear that the board of county commissioners of Storey county possessed no power to discriminate as to the character of the property which should or should not be subject to taxation. That is a question for the legislature, subject to the provisions of the constitution. It is therefore apparent that the order of the board excepting the proceeds of mines from the operation of the levy of the taxes in question, was a mere nullity; and although it was the plain duty of the respondent McDonell, as auditor, to disregard said order and to enter or extend the taxes thus levied upon said assessment-roll, yet he was not in default,

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or guilty of any omission of official duty at the time of the institution of this proceeding, the statute expressly giving him until the fourth Monday (23d), of the month in which to perform his duty in that regard.

It is insisted, however, on the part of the relator, that the alternative writ was properly granted against the auditor and should be made peremptory, notwithstanding the time allowed by the statute for extending the taxes in question had not expired when this proceeding was instituted. The argument, in substance, is that unless the writ issues before the expiration of the designated time, the remedy by mandamus is lost to the people; that it would then be too late, because the assessment-roll would be in the hands of the assessor, and the auditor not having authority to require a re-delivery thereof, would be unable to perform the required act; and inasmuch as the writ will not lie to compel the performance of an act which the respondent is powerless to perform, there would be no adequate remedy against him.

It is true, the statute authorizes the issuance of the writ "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law;" and it may be, as the counsel for the relator suggest, that if the assessment-roll is delivered to the assessor before the tax is extended thereon, that the auditor would not have the power afterwards to recall it for the purpose of making the required extension. The court, however, cannot anticipate that the auditor will not perform his duty within the time prescribed by the statute, and an actual default or omission of duty is just as essential a prerequisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of law. The principle which has for many years governed the administration of the law of mandamus in England, has been uniformly adopted by the courts in the United States, both federal and state, and we are satisfied that the statute of this state is but a legislative recognition of the law as thus administered; and in the language of Crozier, C. J., in the case of *The State ex rel. Price v. Carney et al.*, *supra*: "The court has taken some pains to find a case in which the writ was allowed before the time at which the law required the

act to be performed had elapsed; and although the examination has extended to all the books likely to throw light upon the subject within our reach, no such case has been found, nor has one such been cited by counsel. On the contrary, we have found an unbroken current the other way."

We are, therefore, of opinion that the application for the mandamus in this case was premature, and for that reason must be dismissed as against both of the respondents. This conclusion renders it unnecessary to consider, or at least to express any opinion in respect to the other questions presented or discussed in the briefs of counsel, and we do not desire to be understood as expressing any opinion whatever upon them. It is therefore ordered that the alternative writ and proceeding be dismissed.

[No. 776.]

**THE HUMBOLDT MILL AND MINING COMPANY,
APPELLANT, v. W. E. TERRY, JOHN A. FRIEND,
L. E. DOAN AND RICHARD NASH, SHERIFF, RE-
SPONDENTS.**

FORM OF JUDGMENT.—The sufficiency of the writing, claimed to be a judgment, should always be tested by its substance rather than its form.

IDEM—JUDGMENT OF CONFESSION.—Where a statement and affidavit of confession authorizing the entry of judgment was filed with the clerk and the clerk copied the statement and affidavit in the judgment book and added: "Judgment entered April 14, A. D. 1874: Attest, J. H. Job, clerk," and indorsed the same on the back of the statement: *Held*, that this constitutes a valid judgment. (*Beatty, J., dissenting.*)

IDEM.—The statement and indorsement as entered in the judgment book was evidently intended as a determination of the rights of the parties to the confession, and it clearly shows in intelligible language the relief granted.

IDEM—CLERK'S DUTIES, MINISTERIAL.—In proceedings under the statute authorizing a judgment by confession there is no suit, no recovery or adjudication. The statute expressly authorizes the clerk to enter the judgment. The clerk is not invested with any judicial functions. It is his duty to enter a judgment and he can only enter such a judgment as the parties themselves have expressly authorized by their statement.

IDEM—AUTHORITY TO ENTER JUDGMENT.—The authority to enter the judgment is derived from the statute and the statement. The words "judgment entered," must be considered in connection with the statement. The statement with the indorsement and entry of the clerk, with suffi-

11	237
13	521
13	525

Argument for Appellant.

cient certainty, exhibits the parties, the subject-matter, and the result, and substantially complies with the provisions of the statute, 1 Comp. L. 1422. (*Beatty, J., dissenting.*)

INDEX—EFFECT OF ENTRY OF JUDGMENT.—The entry of the judgment, as made by the clerk, is a final determination of the rights of the parties, and would be a bar to any suit that might be brought upon the promissory note or indebtedness mentioned in the statement of confession.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts are stated in the opinion of the Court.

Robert M. Clarke and M. S. Bonnifield, for Appellant.

I. There was no valid or sufficient judgment entered by the clerk upon the statement of confession. There was no judgment entered upon the statement. There was no judgment entered in the judgment book. There was no judgment roll. (1 Comp. Laws, secs. 1208, 1264, 1420-22; *Freeman on Judgments*, secs. 47, 50-52; 3 Clark, 474, 480; 3 Wis. 362-4; 39 Ill. 9-13; 20 Ala. 298; 13 How. Pr. 289; 3 Or. 406-411; 54 Ill. 189.)

II. The court has jurisdiction to restrain the sale of appellant's property on execution, although there be no valid judgment to support the execution, because if the sale were consummated and the sheriff's deed executed, the purchaser would acquire such an adverse claim as would lay the foundation of an action in equity to determine it. (Civ. P. Act, sec. 256; *Scorpion S. M. Co. v. Marsano*, 10 Nev. 370.)

One of the principal grounds of equity jurisdiction is the prevention of suits at law or in equity, and the prevention of costs and expenses. Wherever a suit might result from the act complained of, if equity did not interfere to prevent it, equity will interfere. (*High on Injunctions*, sec. 147; 7 Vesey, Jr., 413-415; 46 Ill. 122.)

The deed of the sheriff, upon the sale on the execution of the respondents would have, of course, the same effect as if the deed were executed directly by Ginaca and Gintz; and if placed upon record it would naturally create doubts

Argument for Respondent.

as to the validity as against the judgment creditors, of the previous transfer to the appellant.

Such deed is calculated to create uneasiness in the appellant, and to awaken suspicions in others of the existence of concealed defects in the title, and must thus tend to depreciate the value of the property in the market, and to embarrass the owner in its sale or use as security. Against the casting of a shade in this way upon its title, is not appellant entitled to the preventive remedy by injunction? (*U. S. Bank v. Schultz*, 2 Ham. 471; *Norton v. Beaver et al.*, 5 Ham. 179.)

Must not the judgment be entered in court, and is it not the judgment of such court? (Civ. Pr. Act, sec. 361; 4 Kan. 294.)

J. B. Marshall, for Respondent.

I. The judgment is good as between Terry, Friend and Doan, and Ginaca & Gintz, and the plaintiff in this suit not being a creditor of Ginaca & Gintz, cannot attack or set aside the judgment on the grounds of defects or fraud in the statement or judgment. (*Lee v. Figg*, 37 Cal. 328.) Ginaca & Gintz, the defendants, in the statement and confessed judgment are not parties to this action. They make no complaint against the statement or judgment. The plaintiff in this suit having no interest in the confessed judgment, except so far as the judgment lien affects its property purchased of Ginaca & Gintz, subsequent to the judgment by confession, and as appears by the complaint in this action, with full knowledge of the lien of said judgment, cannot interfere with the judgment confessed by Ginaca & Gintz. (*Marriner v. Smith*, 27 Cal. 651; *Freeman on Judg.*, 2d ed., sec. 512.)

II. The acts of fraud on which the charge is based are not specified, and for that reason the complaint is not sufficient. (*Semple v. Hagar*, 27 Cal. 163; *Kent v. Snyder*, 30 Cal. 666; *Castle v. Bader*, 23 Cal. 75; *Meeker v. Harris*, 19 Cal. 278.)

III. If the judgment is void because of irregularities of the clerk in entering it, an injunction to restrain its enforcement cannot be granted. The remedy is by application to

Opinion of the Court—Hawley, C. J.

the district court to quash the execution. (*Sanchez v. Carriaga*, 31 Cal. 170; *Logan v. Hillegass*, 16 Cal. 200.)

IV. If the clerk erred as to form in entering the judgment by confession the remedy is by appeal. A bill in equity to set aside the judgment, and enjoin execution and sale, cannot be sustained. (Freeman on Judg., 2d ed., secs. 487, 532-34; *Hunter v. Hoole*, 17 Cal. 418; *Comstock v. Clemens*, 19 Id. 77; *Chipman v. Bowman*, 14 Id. 157; *Bond v. Pacheco*, 30 Id. 530.)

V. The judgment described in the complaint is a good and valid judgment. (1 Comp. Laws, sec. 1208; Freeman on Judg., 2d ed., secs. 2, 48-51, 129; *Kramer v. Redman*, 9 Iowa, 114; *Gregory v. Nelson*, 41 Cal. 278; *Perkins v. Sierra Nevada S. M. Co.*, 10 Nev. 405; *Hempstead v. Drummond*, 1 Pin. Wis. 535.)

VI. The judgment as entered shows the parties, the matter in dispute, and the result. "The form is immaterial." (Freeman on Judg. secs. 47-55; *Lynch v. Kelly*, 41 Cal. 232; *Feller v. Mulliner*, 2 John. 181; *Gains v. Betts*, 2 Doug. Mich. 99; *Barrett v. Garragan*, 16 Iowa, 47; *Anderson v. Kimbrough*, 5 Cold. Tenn. 260; *Elliott v. Morgan*, 3 Harr. Del. 216; *Moore's Ex'rs. v. Lunnery*, 3 Harr. 28; *Rogers et al. v. Gosnell*, 51 Mo. 468; 44 N. Y. 376; *Shepard v. McNiel*, 38 Cal. 72; *Hamilton v. Ward*, 4 Tex. 360.)

By the Court, HAWLEY, C. J.:

This action was instituted by appellant to enjoin the sale of certain property purchased by it from J. Ginaca and A. Gintz, which the respondent Nash, as sheriff, was proceeding to sell under and by virtue of a writ of execution, issued upon a judgment obtained by respondents, Terry, Friend and Doane, against said Ginaca and Gintz, prior to the sale of the property to appellant, upon the ground that said respondents had no valid judgment against said Ginaca and Gintz.

Respondents interposed a demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and gave judgment in favor of respondents for their costs.

1. The judgment obtained against Ginaca and Gintz was a judgment by confession. It is admitted that the statement and affidavit of confession, authorizing the entry of judgment, conform in every respect to the provisions of section 360 of the civil practice act. (1 Comp. L. 1421.)

The clerk copied the statement and affidavit in the judgment book, and added these words: "Judgment entered, April 14, A. D. 1874. Attest J. H. Job, clerk," and indorsed the same on the back of the statement. Appellant contends that this is not a judgment. The statute which authorizes a judgment by confession to be entered without action, and requires a statement in writing to be made, signed by the defendant and verified by his oath, declares that: "The statement shall be filed with the clerk of the court in which the judgment is to be entered, who shall indorse upon it and enter in the judgment book a judgment of such court for the amount confessed, with ten dollars costs. The judgment and affidavit, with the judgment indorsed, shall thereupon become the judgment roll." (1 Comp. L. 1422.)

It is the usual practice of clerks in entering the judgment to refer to the statement and affidavit, and then to use the formal words: It is, therefore, by reason of the law and the premises considered that said plaintiff * * do have and recover of and from said defendant * * the said sum of * * etc., and such a practice ought, for obvious reasons, to be encouraged and commended. There is, however, no special form absolutely necessary. The sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form. "If it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and shows in intelligible language the relief granted, its claim to confidence will not be lessened, by a want of technical form, nor by the absence of language commonly deemed especially appropriate to formal judicial records. The entry of a judgment, like every other composition, should be comprised of those words which will express the idea intended to be conveyed with the utmost accuracy. It should also be a model of brevity, and should contain no unnecessary directions." (*Freeman on Judgments*, sec. 47.)

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Applying these rules to this case, is not the statement and indorsement, as entered in the judgment book, a judgment? We think it is. It was evidently intended as a determination of the rights of the parties to the confession, and it clearly shows, in intelligible language the relief granted. The statement is signed by Ginaca & Gintz, and concisely states the facts out of which the indebtedness, from them to Terry, Friend, and Doan, arose; the amount of such indebtedness; and the fact that they had executed and delivered to said parties a promissory note for said amount, a copy of which is set out in the statement. It then authorizes "the entry of judgment on said note against us and in favor of W. E. Terry, John A. Friend, and L. E. Doan, in the sum of four thousand six hundred and fifty (\$4,650) dollars in United States gold coin, and that said judgment draw interest from date until paid at the rate of one and one-half ($1\frac{1}{2}$) per cent. per month, payable in like gold coin."

We are of the opinion that the legal effect of the entry and indorsement made by the clerk is the same as if the clerk had indorsed on the back of the statement, and entered in the judgment book, a formal judgment in strict compliance with the provisions of the statute. In proceedings under the statute, authorizing a judgment by confession, there is no suit, no recovery or adjudication. (*Blydenburg v. Northrop*, 13 How. Pr. 290.) The statute expressly authorizes the clerk to enter the judgment. The clerk is not invested with any judicial functions. "He cannot call the parties before him and adjudicate or pass upon their rights." (*Hempstead v. Drummond*, 1 Wis. 536.) His duties are purely ministerial. He has nothing to consider, order, adjudge or decree. It is his duty to enter a judgment; and he can only enter such a judgment as the parties themselves have expressly authorized by their statement. In judgments by confession, as in judgments by default: "The statute directs the judgment. The clerk acts as the agent of the statute, in writing out and filing its judgment among the records of the court." (*Freeman on Judgments*, sec. 129.) The form of the judgment is not material. If it contains

the substance required by law, it is sufficient. (*Stowers v. Milledge et al.* 1 Iowa, 150; *Barrett v. Garragan*, 16 Iowa, 48.)

At common law, judgments are defined as "the sentence of the law, pronounced by the court upon the matter contained in the record." (3 Blackstone Com. 395.) Our statute gives the following definition: "A judgment is the final determination of the rights of the parties in the action or proceeding." (1 Comp. L. 1208.) For further definitions, see *Perkins v. Sierra Nevada S. M. Co.*, (10 Nev. 411,) and the authorities there cited.

The judgment must accord with, and be warranted by the pleadings. The facts need not necessarily be recited in the judgment. (*Hamilton v. Ward*, 4 Tex. 360; *Elliott v. Morgan*, 3 Harrington, Del. 316; *Shepard v. McNeil*, 38 Cal. 73.) The reasons announced by the court to sustain its decision, and the award of execution often contained in the record, constitute no part of the judgment, (Freeman on Judgments, sec. 2) which should always be but a simple sentence of the law upon the ultimate facts admitted by the pleadings or found by the court. (*Gregory v. Nelson*, 41 Cal. 282.) The statute does not prescribe any form for the entry of a judgment. It simply provides that: "The clerk shall keep among the records of the court a book for the entry of judgments, to be called the "judgment book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action." (1 Comp. L. 1264.) In *Ordinary v. McClure*, Johnson, J., in delivering the opinion of the court, said: "In the absence of any statutory or other positive regulation, each department of the judiciary must be left to adopt and pursue its own formula in its proceedings, because neither of them has the power to prescribe in these matters for the others. With respect to matters of substance, there are certain requisites however, which equally apply to every jurisdiction, and without which legal proceedings would be useless and unnecessary. In addition to the ordinary circumstances of time and place, they should, for the most obvious reasons, exhibit the parties, the subject-matter in dispute, and the result. These

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facts being ascertained, the legal consequences follow of course, whatever may be the phraseology used." (1 Bailey, S. Car. Law., 8.) This case, and the general principle it enunciates, has been frequently quoted with approval.

Freeman, in his work on judgments, after mentioning the fact that the authorities are not altogether consistent, says: "I think, however, that from the cases, this general statement may be safely made: That whatever appears upon its face to be intended as the entry of a judgment, will be regarded as sufficiently formal if it show: First. The relief granted; and, Second. That the grant was made by the court in whose records the entry is written. In specifying the relief granted, the parties of whom and for whom it is given, must, of course, be sufficiently identified." (Sec. 50.)

In the case under consideration the authority to enter the judgment is derived from the statute and the statement, and we are of opinion that the statement, the indorsement, and entry of the clerk, with sufficient certainty exhibits the parties, the subject-matter, and the result. It substantially complies with the provisions of the statute in specifying clearly "the relief granted," and in intelligible language gives the "determination of the action." The judgment is entered in accordance with the recitals in the statement of confession. The words *judgment entered* must be considered in connection with said statement. What judgment then is entered? Is it not the one authorized by the statement? The only reasonable, fair and legal construction to be given to the entries, as made by the clerk in the judgment book, is that the judgment entered is in favor of the plaintiffs, Terry, Friend and Doan, and against the defendant, Ginaca & Gintz, for the sum of \$4650, with interest thereon at the rate of one per cent. per month. This is the only judgment that is authorized by the statement, and it is the legitimate conclusion that naturally and regularly follows from the premises of law and fact. The entry is a final determination of the rights of the parties, and would be a bar to any suit that might be brought upon the promissory note or indebtedness mentioned in the statement of confession. (*Johnson v.*

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Gillett, 52 Ill. 360; *Feller v. Mulliner*, 2 John. 181; *Gaines v. Betts*, 2 Doug., Mich. 100; *Lynch v. Kelley*, 41 Cal. 232.)

There usually is, and ought always to be, sufficient personal pride to induce the clerks of the district courts to keep their records in some regular and appropriate manner; but courts have seldom held, and, in our opinion, ought never to hold, that a slight departure from the established and approved form of entering an order or judgment would invalidate all subsequent proceedings, when upon the face of the entry made by the clerk, the substance of the order, or judgment, is clearly manifest. While it is true that the language of the judgment in this case is not in harmony with the approved forms in general use, and is not such as purely technical rules require, nor such as clerks skilled in their duties would be apt to use; yet we are of the opinion that upon the reason and justice of the law, as well as the rules established by decided cases, the essential attributes, the substance of a judgment exists, and that the record, as made by the clerk, must be considered and treated as a valid judgment.

The clerk having made the proper entries of the judgment under the appropriate heads in the docket kept by him, the judgment became, and was, a valid lien upon the property purchased by appellant (1 Comp. L., 1267), and the sheriff was authorized to sell the same under and by virtue of the writ of execution issued upon said judgment.

The judgment of the district court is affirmed.

BEATTY, J., dissenting:

I think the complaint in this action, properly construed, presents a case materially different from that stated in the opinion of the court; but as counsel on both sides have assumed in the argument that the clerk did copy the statement and affidavit of Ginaca & Gintz, with his indorsement thereon, into the judgment-book, and did make sufficient entries in the judgment-docket, it is perhaps allowable to decide the case upon that assumption, more especially as it is probably in accordance with the actual facts outside of

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the record. Even upon the assumption of those facts, however, I dissent from the opinion and judgment of the court.

There is no doubt that the statement and affidavit of Ginaca & Gintz were sufficient to authorize a judgment in favor of Friend and Terry: and that the entry of judgment for the amount confessed, and the other acts to be performed by the clerk thereupon were purely ministerial. It was, nevertheless, essential, in my opinion, that they should be performed. A judgment-lien, if not the creature of the statute, is at least dependent for its acquisition upon compliance with statutory provisions, and it does not attach until the prescribed steps have been taken.

The docketing of a judgment is a purely ministerial function, yet no one would contend that an undocketed judgment constitutes a lien of itself. To my mind there is, in this respect, no difference between a failure to docket and a failure to enter a judgment; or, if there is any difference, the failure to docket would seem to be the slighter omission of the two. The judgment is the principal thing; the docketing is an incident. Each may be essential, but it is the judgment which lies at the foundation of the right. The docketing merely imparts constructive notice of the existence of the judgment; and it might be held, without any violation of the spirit of the statute certainly, that actual notice of its existence would dispense with the docketing.

The court, however, holds that in this case there was a substantial compliance with the statute. I do not think so. The first thing the clerk was required to do upon the filing of the statement and affidavit was to indorse thereon a "judgment" for the amount confessed, with ten dollars costs, and then to enter that judgment in the judgment-book. (Comp. Laws, sec. 1422.) The word "judgment" has a meaning as certain as the word "horse," and the statute is explicit (Sec. 1264) that it shall specify clearly the relief granted, or other determination of the action." Then unless the words "judgment entered April 14, A. D. 1874," come up to this definition of a judgment—and clearly

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they do not—there was no compliance with the first requirement of the law.

As to the entry in the judgment-book, that is, in my opinion, equally insufficient. It should have been a copy of a judgment indorsed on the statement and affidavit. Instead of that it is a copy of a statement and affidavit themselves, and of an indorsement which is no judgment. It is true that, by reading the statement and affidavit, we can arrive, by a process of construction, at a knowledge of what the judgment ought to have been, and so we could have done if the words “judgment entered,” etc., had not been indorsed. It is no compliance with the law, however, to copy into the judgment-book, papers from which a lawyer can infer a judgment. The sentence of the law must be written out, and according to the rule quoted from Freeman by the court, it must show what relief is granted, to whom and from whom. It will not do, where a case has been tried, to make a copy of the pleadings and verdict and stop there; or, in case of a default, to copy the complaint, summons, proof of service, and note of the default, and stop there.

In still another essential particular the clerk failed to comply with the law. It was necessary for him to make and file a judgment-roll before docketing the judgment. He made no judgment-roll, and the materials of such a roll have never had an existence. It must consist of the statement and affidavit, “with the judgment indorsed.” (Section 1422.) But there never was any judgment indorsed on the statement, and consequently there was no roll and could be none. In the opinion of the court it seems to be assumed that the existence of a roll was not essential; but I think otherwise. The allegations in the complaint amount to this: There is no judgment unless the words “judgment entered,” etc., indorsed on the statement, amount to a judgment. The demurrer confesses the truth of that allegation, and the question presented is exactly the same as would arise if these papers had been offered in evidence upon an issue of *null tiel record*. Upon that issue it is said the judgment-roll is the exclusively admissible evidence. Why? Because it is

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in the roll that the judgment exists. I know of but one case in which it has been held that evidence of the existence of a judgment is to be found outside of the judgment-roll—13 Minnesota, 46.

In several cases referred to by Freeman (section 87), it is held that the omission of the mere clerical duty of tacking together the papers comprising the judgment-roll does not invalidate the judgment, but in all of them it is said or assumed that the materials of such a roll must have had an existence. Here the objection is that something essential to the roll never did exist.

The statute seems to recognize the necessity of a judgment-roll for the purpose of creating a lien; for the clerk is directed to file the roll first and then docket the judgment. (Sections 1266, 1267.) If there is to be a lien without a roll it would certainly have been more reasonable to direct the docketing to be done before filing the roll, as an execution may be issued immediately upon the entry of judgment (Section 1272; 34 Cal. 614); for the making up of a roll is a work of time, and in the matter of priority of liens hours, and even minutes, may be of the greatest consequence.

It is no argument to say that a party ought not to be deprived of a right by the neglect of a clerk to perform his clerical duty. There is no right antecedent to a compliance with the statute. No right is taken away by a failure to comply; the party simply fails to acquire a right which he can only enjoy upon condition of compliance. It is his business to see that the clerk performs his duty, and the law affords him the means of enforcing its performance.

The respondents make several other points which amount substantially to this: that even if there was no judgment the plaintiff must fail, because it has not alleged that the sum docketed as a judgment was not deducted from the price paid by it for the land described in the complaint. In support of this proposition they cite the case of *Marriner v. Smith* (27 Cal. 652). But that case does not sustain them, for there it was admitted that there was a judgment against the grantor of the lands valid upon its face and duly docketed at the date of the conveyance. The grantees asked to

Points decided.

have that judgment set aside upon the ground that it had been fraudulently obtained. But the court held that that was a question exclusively between the grantor and the judgment-creditor; and as to the lien of the judgment they said: As this was a subsisting lien at the date of your purchase, of which you had notice, it is to be presumed that the amount of the judgment was deducted from the price paid by you for the land. Here, on the contrary, the question is whether there was a lien. If there was, there is an end of the case; if there was not, there was nothing to be considered in fixing the price of the land. There is no reason for holding that a party is bound to negative a fact when there is no ground for presuming its existence.

The foregoing views appear to me to be sustained by the following cases: (3 Clarke, Iowa, 480-1; 13 How. Pr. 290; 50 Ill. 13; 3 Wisc. 364-5; 20 Ala. 300.) I think the judgment should be reversed.

[No. 754.]

CHARLES W. JONES, ADMINISTRATOR OF THE ESTATE OF
W. JESSUP, RESPONDENT, v. R. S. GAMMANS,
APPELLANT.

OBJECTIONS TO BOOKS OF ACCOUNT—WHEN NEW TRIAL SHOULD BE GRANTED.—

Where the only objection made to the books of account, when offered in evidence, was that the defendant could not testify as to the entries in his books after the death of the party charged, and where the court, in deciding the case, held that said books were improperly kept, and excluded the entries in the books as evidence: *Held*, that inasmuch as the objection made was untenable, and the defendant never had any notice, until after his motion for a new trial had been overruled, that the evidence he had relied upon had been rejected for any other reason than because it was deemed incompetent, a new trial should be granted.

IDEM.—The case must stand or fall upon the correctness or incorrectness of the ruling as it was originally made and announced, and as the book was before the court sitting as a jury, it was error in the court to treat it as not evidence.

IDEM.—OBJECTIONS, WHEN WAIVED.—All objections to the competency of the book as testimony, except the one stated, were waived, and there was a virtual admission that any appearances in the book itself, affecting its competency, were susceptible of explanation.

11	949
11	330
11	249
226	147

Argument for Respondent.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Robert M. Clarke, for appellant.

I. At common law, and before the statute made parties to the action competent witness in their own behalf, a party was competent to prove his books of original entry. (*Star-ke on Ev.*, 9 Ed. 129, and note 1; 8 Watts, 77; 14 Cal. 573-74.) This rule is in no sense changed by the statute. The statute does not restrict, but extends the rule and enlarges the cases in which parties may testify. (Comp. Laws, sec. 1437-1440; *Keech v. Cowles, admr.*, 34 Iowa, 259-261.)

II. The court erred in excluding the book for objections which were not suggested by the plaintiff, in refusing the book for the reason that it appeared to have been improperly kept. The defendant was entitled to have the objections to the competency of the evidence clearly stated at the time, that he might remove them by proper explanations. He could have explained the erasures, etc. (1 Smith's Lead. Cases, pp. 525, 532; 8 Metcalf, 270; *Sharon v. Minnock*, 6 Nev. 377, 382-83.)

W. M. Boardman and Haydon & Cain, for respondent.

I. The court will not grant a new trial on the ground of insufficiency of evidence to justify the decision and judgment of the court, because the statement does not purport to contain all the evidence in the cause. (*Libby v. Dalton*, 9 Nev. 23; *Sherwood v. Sissar*, 5 Nev. 349.)

II. We deny the proposition that the book of account, being admitted for the consideration of the jury or a court sitting as a jury, was conclusive evidence, and that the court was under the obligation to place full and entire reliance on its entries.

The judge or jury must draw their own conclusions from an inspection of the book, the fairness or unfairness of the book from its appearance, the time and manner of making the entries, whether any, and what evidence has been given

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to corroborate the charges; all these are proper subjects for the due consideration of the judge or jury. (*Cowen's Treatise*, 2 vol. 1435; *Caldwell v. McDermot*, 17 Cal. 465; 1 Smith's Lead. Cases, 528-532.) And when the party, whose estate is sought to be charged by a book of accounts is "dead," extreme caution should be used and exercised by a court in determining its weight and its credibility, and other evidence in corroboration of the charges, should in such cases be given as far as possible. (*Lloyd v. Lloyd*, 1 Redfield, 399.)

III. Whether before the court by the consent of plaintiff, or upon a good foundation being laid for its introduction as evidence, it was still only *prima facie* evidence, to be entirely rejected, if the court found sufficient cause therefor. It is not claimed by appellant that the court erred for want of cause in rejecting the book, but that the court erred in rejecting it under any and all circumstances, showing that it was not entitled to credit, "because plaintiff did not make that objection," but relied upon another objection. We hold that although our reason for asking its rejection was wrong, yet, if it was properly rejected by the court, it is immaterial for what reason.

IV. The entries referred to were offered in evidence to prove "payments" by defendant to deceased in his lifetime, and were not admissible for that purpose. (*Irvine v. Wortendyke*, 2 E. D. Smith, 374.)

By the Court, BEATTY, J.:

In this case, plaintiff sues to recover a sum of about twenty-five hundred dollars, claimed to have been due to his intestate for services rendered, goods sold, money loaned, etc. Defendant, by his answer, admits an original indebtedness of about seventeen hundred dollars, but pleads a number of counter-claims, and demands judgment for a balance which he claims to be due to himself.

On the trial, which was by the court, plaintiff failed to prove any indebtedness beyond that admitted in the answer. The defendant, upon his part, proved by the testimony of disinterested witnesses, items of his account against the de-

ceased, amounting to about eight hundred and forty dollars. To prove the other charges, which were for cash payments to deceased, and to third parties for him, board, washing, nursing, ranching stock, etc., aggregating upwards of a thousand dollars, the defendant offered in evidence a book of accounts, which he testified was a book of original entries, kept by himself, containing a particular account of all his business transactions.

The only objection made by the plaintiff to the admission of this book in evidence was "on the ground that the book was excluded under our statute, that the defendant could not testify as to his books of original entries after the death of the party charged. That it was, in effect, permitting defendant to testify to matters which had occurred between deceased and defendant preceding the death and in the lifetime of the deceased."

Upon this objection the court reserved its decision, which was not announced until the findings were filed, in which it was incorporated as follows: "XI. That the book of defendant, purporting to contain the accounts between the deceased and this defendant, is improperly kept, and that it appears from the inspection of the said book itself, that it is not a proper book to be admitted in evidence as showing the state of the accounts between the said W. Jessup, deceased, and this defendant, and for that reason ought to be excluded, and the entries therein are not evidence in this cause."

This, although included among the findings of fact, cannot be regarded in any other light than as the ruling of the court upon the point reserved for its decision; and it shows clearly that the court excluded the evidence on the ground of incompetence. If this was an error, it falls under the head of "errors in law occurring at the trial," and, as the defendant, in his motion for a new trial, took the earliest opportunity of objecting to it, he must be deemed to have excepted to the ruling when it was made. That the ruling was prejudicial to the defendant, if erroneous, cannot be doubted, for the result of it was that he received no credit for any charge supported by the evidence of the book alone, and the plaintiff had judgment for a balance of seven hun-

dred and fifty-nine dollars. The defendant appeals from the judgment and the order overruling his motion for a new trial, which was based, among other grounds, upon error of the court in excluding his book of accounts. As that point is, in our opinion, decisive of the case, it is the only one which we will consider.

The respondent concedes that the objection which was made to the admission of the book in evidence, was untenable, but he seeks to sustain the judgment and order appealed from, upon the ground indicated by the district judge in his order overruling the motion for a new trial; that is to say, upon the ground that the book of accounts bore such evidences of fraud upon its face as to be totally unworthy of credit. His argument seems to be this: that although it may have been error to exclude the book upon the ground of incompetency, the error was not prejudicial to the defendant, because, if the judge, upon inspection of the book, concluded that it was incompetent evidence on account of its fraudulent appearance, he must necessarily, acting as a jury, have rejected it as totally incredible, and that, in fact, he did reject it for that reason, as is shown by his order denying the motion for a new trial.

It is no doubt true that appearances of fraud on the face of an account book affect its credibility no less than its competency, and if this book had been weighed and considered as evidence and then denied any credit on account of such appearances, and the defendant informed of the ground of its rejection before his motion for a new trial, he might have had no ground of complaint. We have not examined the original book, although by agreement of the parties it is to be treated as a part of the record in this court, and produced for inspection if desired. It may be in the eyes of a jury *felo de se*. But even if that is so, the answer to respondent's argument is that appellant's motion for a new trial was addressed to the case as it then stood, and as it then stood, it appeared that the court had rejected the account book as incompetent, and had refused to treat it as evidence in the case. The proper ground of his motion was, therefore, an allegation of error of law, whereas,

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if the book had been treated as evidence, but discredited, he might have moved upon some other ground, which would have given him an opportunity of explaining its apparent discrepancies. The terms of the ruling of the court below do not indicate that the book was rejected on account of fraudulent appearances, and it would be more readily inferred from the expressions "improperly kept" and "not a proper book," that the fault found with it was that it was kept like a ledger, for instance, instead of a book of original entries. The defendant, therefore, never had any notice, actual or inferential, until after his motion for a new trial had been overruled, that the evidence he relied on had been rejected for any other reason than because it was deemed incompetent; and it would be most unjust to him to sustain the order of the district court on the ground now relied upon. It must stand or fall upon the correctness or incorrectness of the ruling as it was originally made and announced, and as to that question, the whole ground seems to be covered by the admission, in his argument, by counsel for respondent, that "the book was before the court sitting as a jury, by *consent of plaintiff*." If it was evidence before the court by consent of plaintiff, it was certainly error in the court to treat it as not evidence. (*Sherwood v. Sissa*, 5 Nev. 354-5.) In the case just cited, the point determined was very similar to that presented in this case. The questions whether, independent of our statute permitting parties to be witnesses in their own behalf, books of account are admissible as evidence in favor of the party who has kept them, and, if so, to what extent, were not decided; but it was held that being admitted without objection they become evidence, and are to be weighed and taken for what they are worth. The decision in that case covers this, and it is perhaps unnecessary to go further. It may be added, however, that the respondent concedes that the strongest authority supports this rule: That books of original entry, on proper foundation being laid by the oath of the party who has kept them, are, independent of our statute, competent evidence to prove, *prima facie*, services rendered and goods delivered and their values. But he

Points decided.

denies that they are competent to prove cash payments either to the party charged, or to third persons on his account; and he says many of the charges in the defendant's book were for such payments. We do not decide these questions, as they are not presented by the case before us. Even according to the rule above stated, the charges in the book for board and washing and nursing and stock-ranching were competent evidence; and if received and credited, would have largely reduced the judgment.

Our decision, however, goes upon the ground that all objections to the competency of the testimony, except the one stated, were waived (*Sharon v. Minnock*, 6 Nev. 382), and there was a virtual admission that any appearances in the book itself, affecting its competency, were susceptible of explanation. (1 Smith's L. C., 525-532; 8 Metcalfe, 270.)

The judgment and order appealed from are reversed and cause remanded.

[No. 778]

THE STATE OF NEVADA, RESPONDENT, v. EPHRAIM RICKETT, APPELLANT.

11	255
91	30
21	213
34	433
28	230

ATTEMPT TO COMMIT RAPE—CONSENT OF FEMALE.—An attempt to commit rape does not constitute an assault when the female actually consents to what is done, whether she be within the age of twelve years or not.

IDEM.—An assault is a necessary ingredient of every rape or attempted rape, but it not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years with or without her consent, which under the statute of this state is also called rape.

IDEM.—As an assault implies force and resistance, the crime of "carnally knowing a child, etc.," may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female.

IDEM.—There can be no assault upon a consenting female, although there may be what the statute designates a rape.

IDEM.—By virtue of the provisions of the statutes of this state, (Comp. Laws, sections 2464 and 2037) the defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did, but it was error to instruct the jury that he could under such circumstances be convicted of "assault with intent to commit rape."

APPEAL from the District Court of the Fifth Judicial District, Lander County.

Opinion of the Court—Beatty, J.

The facts are stated in the opinion.

T. W. W. Davies, for Appellant.

M. S. Bonnifield, also for Appellant.

J. R. Kittrell, Attorney-General, for Respondent.

The point upon which the case was decided, was not discussed in the brief filed by the attorney-general.

I. The verdict and judgment are against law, because the testimony shows that the girl *consented* to what was done, if anything by the defendant. To bring the case within the statute, there must have been not only an *intent* to commit a rape, but that intent must have been manifested by an *assault* upon the person intended to be ravished. The statute requires both ingredients, and we can dispense with neither. An *assault* implies force upon one side, and repulsion, or want of assault, upon the other. * * *

“An *assault* upon a *consenting* female, old or young, is a contradiction in terms, a legal impossibility.” Although the child is incapable of giving a legal consent, yet if she give an *actual* consent there can be no *assault*. (*Smith v. The State*, 12 Ohio, 466; *O'Meara v. State*, 17 Ohio, 519; *Reg v. Read et al.*, 2 Carr. & Kind. 386; *Reg v. Read et al.*, 1 Den. Cr. Cas. 377, also note on p. 379; *Reg v. Martin*, 9 C. & P. 213; *Reg v. Meredith*, 8 C. & P. 589; 2 Bish. Cr. Law, sec. 930, and cases cited.

By the Court, BEATTY, J.:

One of the assignments of error in this case is, in our opinion, well founded. The defendant was indicted for rape, and convicted of an assault with intent to commit rape. His motion for a new trial was overruled, and he was sentenced to fourteen years' imprisonment. The evidence adduced at the trial showed that the object of the supposed assault was a female under the age of twelve years, and in submitting the case to the jury, the court among other things charged them as follows: “If the female is under the age of twelve years, she is deemed in-

capable of consenting to any carnal intercourse, and the legal presumption that any such carnal knowledge is forcible and against her will is conclusive. If the jury believe from the evidence that the defendant is over fourteen years of age, and that the girl known as Caroline Davis is under the age of twelve years, and at the time and place charged in the indictment, the defendant did have carnal knowledge of her by penetrating her body, he is guilty of rape. * * But if the jury believe that the defendant attempted to commit a rape and failed to effect a penetration, as above described, they should find a verdict of guilty of an assault with the intent to commit rape." To the giving of this charge the defendant excepted; and he argues that it was erroneous, for this reason: that the jury was thereby instructed that upon proof of an unsuccessful attempt to have carnal knowledge of the girl, he might be convicted of an assault to commit rape, although everything he did was with her actual consent—the law being, as he contends, that an attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she be within the age of twelve years or not.

When the proposition was stated on the oral argument of the case, I was strongly inclined to consider it untenable, and to hold that the charge of the district judge was correct; but after examining the cases relating to the subject, I am convinced that the weight of reason and authority is on the side of the appellant.

The common law definition of rape is "the carnal knowledge of a woman forcibly and against her will." (4 Blacks. Com., 210.) The same definition is adopted by our statute. (Comp. Laws, sec. 2350.) Under this definition, an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are

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not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. As an assault implies force and resistance, the crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female.

This is well settled in England, where, under the provisions of several statutes, the carnal knowledge of a female under ten years of age, with or without her consent, is made a "felony." The statutory crime is not there denominated "rape," and the English judges have escaped the confusion of ideas which in this country has no doubt arisen from the fact that two essentially different crimes have been called by the same name, leading our courts, in some instances, to attribute to the statutory rape all the qualities of common law rape. Thus in the case of *Hays v. The People* (1 Hill, 352), where the precise question here involved was under discussion, Judge Cowen, delivering the opinion of the court, said: "The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor any more than if he had consummated his purpose." And this construction was afterwards adopted by the Supreme Court of Michigan in the case of *The People v. McDonald* (9 Mich. 150). The New York case was decided in 1841, and no reference was made to several cases then recently decided in England, by which a different construction had been given to a statute substantially the same as that of New York. The court was probably not aware of those decisions. The Michigan case was decided twenty years later, but the court took no notice of the English decisions, though they were referred to on the argument. There may be other cases which sustain the same view, but if so, they have escaped our attention. On the other hand, there is a still later case decided by the Supreme Court of Ohio (*Smith v. The State*, 12 Ohio, 466), in which an opposite conclusion is reached after a full discussion of the question and elaborate review of the authorities. The rea-

soning of this decision appears to us entirely satisfactory, and it is sustained by the authority of some of the most eminent of the recent English judges. (See *Reg. v. Martin*, 9 C. & P. 213; *Reg. v. Meredith*, and *Reg. v. Banks*, 8 C. & P. 589, 575; *Reg. v. Read*, 2 Car. & Kirw. 937, and 1 Denison's Crown Cases, 377, and note to page 379.)

We are not, however, forced to the conclusion reluctantly accepted by the Ohio court, that our law provides no punishment for an attempt to have carnal knowledge of a consenting child within the age of twelve years. Our statute, so far from abolishing the common law rule, that an attempt to commit a felony is a misdemeanor, has enlarged that rule and made specific provision for the punishment of attempts to commit offenses of every grade. (C. L., sec. 2464.) By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of "assault with intent," etc., in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape. It is quite possible, if this distinction had been drawn in the instructions to the jury, that the defendant would only have been convicted of the attempt, for which the extreme punishment is ten years' imprisonment. (C. L., sec. 2464.) Whereas, the "assault with intent," etc., of which he was convicted, may be punished by fourteen years' imprisonment, and the defendant actually received that sentence. (C. L., sec. 2353.)

The judgment is reversed and cause remanded for a new trial.

Argument for Appellant.

[No. 774.]

ESTATE OF DAVID WALLEY, DECEASED. IN THE
MATTER OF THE APPLICATION OF HARRIET J. WAL-
LEY, ADMINISTRATRIX, TO HAVE A HOMESTEAD SET APART
TO HER.

HOMESTEAD—SECTION 123 OF THE PROBATE ACT CONSTRUED.—The expression in section 123, "may set apart for the use of the family of the deceased," must be considered as imperative and mandatory as if it had read, *shall* set apart.

IDEM—SECTION 126 CONSTRUED.—By section 126, the legislature intended to embrace within the meaning of the words "family of the deceased," a childless widow.

REPEAL OF STATUTES BY IMPLICATION—HOMESTEAD ACT OF 1865.—Repeals by implication are not favored, and are only held to have occurred in cases of irreconcilable repugnancy between the later and former enactments, where the two cannot stand together, and there is no such repugnancy between the probate act and the homestead act.

HOMESTEAD UNDER HOMESTEAD ACT.—Under the homestead act, the homestead is exempted from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter whether the debts were contracted before or after the family relation commenced, or before or after the homestead was dedicated.

IDEM—PROBATE ACT.—Under the probate act the homestead is exempted in favor of the widow or minor child or children of a deceased person, from the payment of the general debts contracted by him in his lifetime, and from debts accruing in the course of administration.

IDEM.—To claim the homestead under the homestead law, the widow would have to show that she was the head of a family.

ABANDONMENT OF HOMESTEAD.—The only effect of a written abandonment of the homestead was to invest the husband with the power to alienate the premises or subject them to some specific lien during the continuance of the abandonment.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

D. W. Virgin, for Appellant.

I. The acts of Walley and wife were sufficient under the existing law concerning homesteads and the state constitution subsequently adopted, to stamp the character of homestead upon said premises and to indicate their selection and dedication thereof as a homestead, and long before the

Argument for Appellant.

homestead law of 1864-5 was enacted Walley and his wife had a vested homestead right in said premises. (Const., Art. IV, sec. 30; *Goldman v. Clark*, 1 Nev. 607; *Clark v. Shannon*, 1 Id. 568; Act 1861, p. 24; Const. Debates, 284, 303, 304, 314.)

II. The abandonment of homestead of Walley and his wife made in December, 1872, was, in effect, a declaration on their part that up to that time they had claimed said property as their homestead; and if said abandonment, though general in its terms, only operated as a special and limited one, removing the homestead exemption only as to the particular creditor, the mortgagee, then it was a sufficient declaration of intention on their part to continue to hold and claim the same as their homestead as to all the world except the creditor in whose favor said abandonment was made.

III. Admitting for the purpose of argument, that it was necessary for Walley or his wife to make a declaration of homestead upon said property in order to hold it as such, then under the decision of this court in *Hawthorne and Wife v. Smith*, (3 Nev. 185), the declaration could be made at any time before sale. Why then may not the widow make it? She could have made it during her husband's lifetime, surely the law did not intend *her right* to die with her husband; did not intend that the very calamity a homestead was intended to provide against should be the destruction of the homestead; for, although the surviving wife is no longer a married woman, yet she is the family of the deceased and all the family he left, or ever had beside himself, therefore she is the *head* of the family, and as such retains her right at any time to claim a homestead, and when she filed her petition to the district judge she did claim a homestead. (Probate Act, Vol. 1, Comp. L. pp. 158-9, secs. 602 to 607, both inclusive.)

IV. If there was no exempt homestead until a declaration was made by Walley or his wife, then there was no homestead right to abandon in December, 1872, and the abandonment then executed by Walley and his wife was ineffectual for any purpose unless as an estoppel to prevent

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Walley and his wife, or either of them, from setting up their homestead as against the mortgagee.

R. M. Clarke, for Respondent.

I. No person who is not married or who is not the head of a family is entitled to a homestead. (Const., Art. IV, sec. 30, Comp. Laws, secs. 186, 687; 14 Cal. 477; 31 Cal. 526-34.)

By the Court, BEATTY, J.:

This is an appeal from an order denying the petition of appellant to have a homestead set apart for her use and declared not subject to administration. The material facts disclosed by the statement on appeal are as follows: Petitioner and deceased were married prior to the year 1863. During that year they commenced residing on the premises now claimed as a homestead, and resided there continuously until the death of the husband in 1875. No declaration of homestead was ever made or filed by them, or either of them, although all the facts existed which would have entitled either of them to do so at any time subsequent to the passage of the homestead act of March 6, 1865, and prior to the death of the husband.

In December, 1872, being desirous of raising money on a mortgage of the premises, the petitioner and her husband made and filed a formal and general abandonment of all claim of homestead therein, such declaration being considered by the mortgagee necessary for his security. Notwithstanding this declaration, however, petitioner and her husband continued, as above stated, to reside on the premises, making them their actual home. The petitioner has never had any children, and has not now any relative residing with or dependent upon her, and the sole question to be decided is, whether, under these circumstances, she is entitled to have the homestead set apart for her use, exempt from the claims of the general creditors of the estate.

Section 123 of the act to regulate the settlement of the estates of deceased persons reads as follows: "Upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may, of

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his own motion, or on application, set apart, for the use of the family of the deceased, all personal property which is by law exempt from execution, and the homestead as designated by the general homestead law, or by section 126 of this act."

The first clause of section 126 reads as follows: "If there is no law in force exempting property from execution, the following shall be set apart for the use of *the widow or minor child or children, and shall not be subject to administration.*" It then proceeds to enumerate the articles to be exempted, and among the rest the homestead, to consist of the dwelling and a limited amount of land, not exceeding five thousand dollars in value.

These two sections, construed together, and considered without reference to other provisions of the statutes and constitution, seem to have a very clear meaning. In the first place, the expression in section 123, "may set apart for the use of the family of the deceased," must, on a familiar principle of construction, be considered as imperative and mandatory as if it had read "*shall set apart,*" etc.; and in the next place it is clear, from the language of section 126, that the legislature intended to embrace within the meaning of the words "family of the deceased" a childless widow. The property is to be set apart for the use of "*the widow or minor child or children.*" The effect of these provisions is therefore the same as if the wording of the statute had been as follows: The probate court or judge shall set apart for the use of the widow of any deceased person all spinning-wheels, books, etc., and the homestead. And unless they have been repealed, or superseded, or qualified by some provision of the constitution or subsequent statutes, the appellant is clearly entitled to the relief which she prays for.

It is not contended that any provision of the constitution affects the operation of this part of the probate act; but it seems to have been considered by the district judge that the homestead act of 1865 was exclusively applicable to the case, on the principle, no doubt, that being a later enactment relating to the same subject, it repealed the former by

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implication. This view, if we are correct in attributing it to the district judge, was, we think, a mistake. Repeals by implication are not favored, and are only held to have occurred in cases of irreconcilable repugnancy between the later and the former enactment, when the two cannot stand together, (*Thorpe v. Schooling*, 7 Nevada, 17) and there is no such repugnancy between these two acts. Each may stand and have its full operation without coming in conflict with any provision of the other. They are entirely independent, and, in fact, contemplate different objects. Each is intended to exempt the homestead from certain liabilities; but the one, the homestead act, exempts it from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter at what time, after November 13, 1861, the debts may have been contracted—whether before or after the family relation commenced, or before or after the homestead was dedicated. The other, the probate act, has a more limited, but at the same time, an independent operation. It merely exempts the homestead in favor of the widow or minor child or children of a deceased person, from the payment of the general debts contracted by him in his lifetime, and from debts accruing in the course of administration. A homestead, set apart under the probate act, simply becomes not subject to administration, that is, not subject to the claims of general creditors of the estate, but it remains subject, in the hands of the widow, to the payment of her debts, whether contracted before or after it was so set apart. To make it a homestead, within the meaning of the homestead act, so as to be exempt from the payment of her debts, as well as those of her deceased husband, she would have to claim it under the homestead law; and, in order to do that, she would be obliged to show that she was the head of the family, which the appellant in this case has not done. It does not follow, however, that because she cannot avail herself of the privileges of the homestead act and secure a homestead that will be exempt from liability for her own debts, that she must therefore be denied the benefit of an act which was designed to secure to a widow, whether childless

or not, a homestead exempt from liability for the debts of her deceased husband. It would indeed be a strange anomaly in our laws if they really bore this construction: that a man and his wife, or either of them, may, at any time before his death, exempt their homestead from all liability for the debts of either, whether contracted before or after the declaration of homestead; but that, if the husband dies before such declaration is made, his widow, if she happens to be childless, must be turned out of doors in order to pay the expenses of administration—that the very bereavement that makes the exemption of a homestead more necessary, utterly deprives her of the right. In this case, there can be no doubt that at any time before the death of David Walley, he or his wife, either, might have secured this homestead from liability for his debts by filing the declaration provided for in the homestead act. Since his death, she has lost the right to proceed under that act, because she is “unmarried” and is not the “head of a family,” and if her rights were not otherwise secured, it might follow that her husband’s creditors could take from her what they could not have taken from him in his lifetime. But her rights are otherwise secured. They are secured by the provisions of the probate act above quoted, which have never been repealed by implication or otherwise.

It is in section four of the homestead act (C. L. 189), if in any, that the repugnant matter is to be found. That section is an enlargement and adaptation of section 9 of the homestead act of 1861, of which the whole act is simply a re-enactment with some trifling alterations, and the addition of provisions for recording homesteads and declarations of abandonment, made, no doubt, for the purpose of carrying out the apparent purpose of the framers of the constitution to make registration of the homestead a condition precedent to its exemption, and to the disability of the owner to alienate or incumber it. It is true that the terms in which the law was enacted defeated the intention of its framers (*Hawthorne v. Smith*, 3 Nev. 182;) but still it is apparent that it was passed with no other object than the one supposed, and, least of all, with the object of taking away.

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the existing rights of widows and minor children. Section 4 of the act is as follows: "The homestead and other property exempt from forced sales shall, upon the death of either husband or wife, be set apart by the court for the benefit of the surviving husband or wife, and his or her legitimate children; and in the event of there being no survivor or legitimate children, then the property shall be subject to the payment of their debts; *provided*, that the exemption provided for in this act shall not extend to unmarried persons, except when they have the care and maintenance of minor brothers or sisters, or both, or brothers' or sisters' minor children, or a father or mother, or both, or grandparents or unmarried sisters living in the house with them." This section, down to the *proviso*, is not only consistent with the provisions of the probate act upon which the appellant relies, but enlarges their operation. It enables the probate court to do for a childless widower what the probate act only authorizes to be done for a widow. It protects the homestead in his hands against her debts as the former act protected it in her hands against his debts. If it does not mean this it means nothing. The *proviso* does not conflict with this construction. It seems to have been added, like most *provisos*, out of abundant caution. Apparently, it was feared that without the qualification contained in the *proviso* the section might be construed to mean that a surviving husband or wife, though childless and without dependent relatives, would take the homestead, and hold it, not only exempt from claims against the deceased, but also from the debts of the survivor, which is the "exemption provided for in this act," and which, therefore, is the only exemption excluded by the *proviso*. The other exemption in favor of the survivor against the debts of the deceased is not excluded by it, and this is the only exemption which the appellant claims.

Another point remaining to be noticed is the effect of the declaration of abandonment of homestead made by the appellant and her deceased husband. As to this point it is to be observed that the law does not make the filing of a declaration of abandonment of a homestead constitute in itself

Opinion of Hawley, C. J., concurring.

an abandonment. There can be no abandonment without the filing of such a declaration, but it does not necessarily follow that an abandonment takes place whenever such a declaration is filed. It may be that it is also necessary for the parties to cease to reside on the premises. But in the view we entertain of the case, it will not be necessary to decide this question. Supposing there was an abandonment, the only effect of it was to invest the husband with the power to alienate the premises or subject them to some specific lien during the continuance of the abandonment. There was nothing to prevent the parties from again declaring a claim of homestead in the same premises, the effect of which would have been to exempt them from liability for any debt contracted subsequent to Nov. 13, 1861, and not secured by specific lien. (Com. L. 186; *Hawthorne v. Smith*, supra.) Still less was there anything to prevent the district judge from setting apart the actual homestead for the use of the widow. "The homestead as designated by the general homestead law," which he is commanded to set apart for her use, is not a homestead that has already been secured by that law, but a homestead of the character and value prescribed by that law.

For these reasons the order of the district court must be reversed, and the cause remanded for further proceedings to be had in accordance with the views herein expressed. The homestead claimed by the appellant in this case being appraised at more than five thousand dollars, and being subject to the payment of the mortgage of Virgin, may have to be sold, but in case of a sale the right of the widow to five thousand dollars of the proceeds, if that much remains after payment of the mortgage and expenses of foreclosure, must be secured. All of which is so ordered.

HAWLEY, C. J., concurring:

I concur in the opinion of the court, that it was the duty of the district judge, under the provisions of the statutes cited to set apart the property for the use of the petitioner; but I have doubts whether the property, when so set apart, would be subject to the payment of her debts; and as this

Points decided.

question is not, in my judgment, necessarily involved in the decision of this case, I do not express any opinion in regard to it.

[No. 760.]

N. D. CHAMBERLAIN AND J. P. WINNIE, RESPONDENTS, v. L. STERN, APPELLANT.

POSSESSION OF PERSONAL PROPERTY.—Where certain personal property was sold on the twenty-first of November, and the testimony shows a delivery at that time, and a change of possession until April 1, but after that date and before the levy of a third party, the possession was restored to the grantor, who was in actual possession at the time of the levy as bailor: *Held*, that the court erred in finding that the change of possession continued after April 1, and in finding that the defendant took the property from the grantees.

IDEM.—Whether the change of possession that did take place was sufficiently open, unequivocal and continuous, to satisfy the statute of frauds, is a question of fact for the court or jury to determine.

CONSIDERATION OF SALE.—Where the bill of sale offered in evidence recited a consideration of \$1,600, and the grantor and grantee both testified that money was paid: *Held*, that it was error to refuse to allow the defendant to ask these witnesses how much money was paid as the consideration of the alleged sale.

PLEADINGS ALLEGING FRAUD.—Where personal property is found in the possession of the execution debtor, and, after levy, is claimed by a stranger, the officer is not bound to surmise that there may have been a sale, and so attack it for fraud in his answer.

IDEM.—The officer is not bound to assail the transaction till it is brought to his knowledge, and if it makes its first appearance at the trial, he may meet it there with proof of the fraud.

FRAUD, HOW ESTABLISHED—BURDEN OF PROOF.—Proof of fraud was part of the defendant's case, but proof of the consideration was part of the plaintiff's case; to prove the amount of the consideration was not to prove fraud. Inadequacy of consideration is an element of fraud in some cases, and the burden of proving it in this case was on the defendant, but he had a right to know what the amount of the consideration was before offering proof that it was inadequate.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

Harris & Coffin and Thomas H. Wells, for Appellant.

I. The answer alleged fraud on the part of the plaintiffs, and the defendant was denied by the court his legal right to prove it. Failure of consideration, even inadequacy of price is proof (not *per se* sufficient or conclusive, but in connection with other evidence) to establish fraud; and if fraud be alleged, anything or fact tending to establish it, may be given in evidence. (*Bump on Fraud. Conv.*, 507 *et seq.*, and 541 *et seq.*, and cases there cited; 2 Cal. 326; 6 Id. 47; 7 Id. 391.)

II. There was not "an actual and continued change of possession" of the property." (10 Cal. 431; 12 Id. 483.)

Robert M. Clarke, for Respondent.

I. It is not sufficient in pleading to charge fraud in general terms. The facts which constitute the fraud must be specially alleged. (*Castle v. Bader*, 23 Cal. 75; *Kent v. Snyder*, 30 Id. 666; *Moore v. Green*, 29 How. Pr., 69; *Butler v. Viele*, 44 Barb. 166.)

No attempt is made to charge actual fraud in the answer. On the contrary, constructive fraud is alleged and relied upon.

The averment of facts which constitute constructive fraud is an implied admission of the *bona fides* of the sale, as between the parties—of the absence of actual fraud. (*Thornton v. Hook*, 36 Cal. 230.) In the state of the pleadings it was not error to deny defendant's offer to prove actual fraud.

II. The delivery in the case was actual and the change of possession continuous. (*Godchaux v. Mulford*, 26 Cal. 316; *Gray v. Sullivan*, 10 Nev. 416.)

By the Court, BEATTY, J.:

This is a suit to recover certain personal property consisting of a lot of horses, alleged to be wrongfully and unlawfully detained by the defendant. The answer denies that they are the property of the plaintiffs, and alleges that they were seized by the defendant acting as constable under

Opinion of the Court—Beatty, J.

certain writs of attachment and execution against one Lovejoy, who, it is averred, is the real owner. The case was tried in the district court without a jury and the findings and judgment were in favor of the plaintiffs. The defendant now appeals from the judgment and the order of the district court overruling his motion for a new trial.

The following facts were established on the trial by uncontradicted testimony: On the twenty-first of November, A. D. 1874, Lovejoy was the owner of the property in controversy and also of other cattle and horses, all of which he had in his possession on a ranch in Douglas county where he then resided. At the same time and place he had in his possession a number of horses which he was ranching for other parties. Previous to this date, and during the summer and fall of 1874, all of this stock had been kept by Lovejoy in an inclosed pasture belonging to him and situated near Carson city. On the night of November 21, Winnie, one of the plaintiffs, went to the ranch where the stock then was, obtained a bill of sale of Lovejoy's cattle and horses, and, with the assistance of Lovejoy and another person, drove them, together with the horses which Lovejoy was ranching for third parties, to the ranch of one Olds, distant a mile from Lovejoy's place. Olds agreed with Winnie to pasture the cattle and horses which he had purchased and gave him a receipt for them. The horses which are the subject of this action remained on the ranch of Olds until the first of April, but during the interval between November 21 and April 1, Lovejoy was occasionally there looking after the horses he was ranching for third parties, and during the same time he, with two others, drove the cattle which were included in the purchase of plaintiffs to Empire city. On the last mentioned date, April 1, 1875, Winnie and Lovejoy took all the horses from Old's ranch, including those which Lovejoy was ranching for third parties, drove them to Carson and put them in Lovejoy's pasture where they had been running previous to the sale. This pasture had been recently purchased by Patterson under an execution against Lovejoy, but the time for redemption had not expired and Lovejoy remained in posses-

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sion. While the horses in controversy were in Lovejoy's pasture, mixed with other horses that he was ranching for third parties, and as far as appearances could show, as much his property as they had ever been, the defendant made his levy under valid process against him. There can be no doubt that when the levy was made the property was in the actual possession of Lovejoy, the execution debtor. He may not have been in possession as owner but the evidence clearly shows that he was a bailee. The district judge erred, therefore, in finding that the change of possession continued after the first of April, and that the defendant took the horses from the possession of the plaintiffs. The testimony does show a delivery at the time of the sale and a change of possession from November 21 to April 1. But after that date the possession was restored to Lovejoy. Whether the change of possession that did take place was sufficiently open, unequivocal and continuous to satisfy the doctrine of *Stevens v. Irwin* (15 Cal. 507), so frequently approved by this court, was a question of fact not decided by the district court, its conclusions being based upon the erroneous finding that Lovejoy continued out of the possession.

The district court also erred in refusing to allow the defendant to ask Winnie and Lovejoy, on cross-examination, how much money was paid as the consideration of the alleged sale. The bill of sale offered in evidence by the plaintiffs recited a consideration of sixteen hundred dollars, and both Winnie and Lovejoy testified that money was paid; but when defendant asked how much, the plaintiffs objected that he had not alleged, in his answer, facts constituting actual fraud in the sale, and that proof of the amount paid was therefore wholly immaterial. The court sustained the objection, defendant excepting.

The respondents contend that the ruling was correct, and cite authorities to show that fraud cannot be proved without having been specially pleaded. This is no doubt true in the class of cases referred to, where suit is brought to set aside a conveyance or contract on the ground of fraud, or where fraud is the defense to a contract set out in the com-

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plaint, or where the defendant is presumed to have knowledge of the transaction which he seeks to impeach on that ground. And there may be good reason to hold that where property is seized in the hands of a stranger to the execution, the officer must plead fraud in answer to his suit. But where the property is found in the possession of the execution debtor, and, after levy, is claimed by a stranger, the officer is not bound to surmise that there may have been a sale, and to attack it for fraud in his answer. He is not bound to assail the transaction till it is brought to his knowledge, and if it makes its first appearance at the trial, he may meet it there with proof of the fraud. (See *Bump on Fraud. Convey.*, 508; *Gooch's Case*, 5 Co., 60; and *Ashby v. Minnitt*, 8 A. & E. 121.) These cases show that the defendant in this action was in a position to attack the sale for actual fraud, and the question asked was material and relevant. It was also proper cross-examination. Proof of fraud was part of the defendant's case, but proof of the consideration was part of the plaintiffs' case. To prove the amount of the consideration was not to prove fraud. Inadequacy of consideration is an element of fraud in some cases, and the burden of proving it in this case was on the defendant. But he had a right to know what the amount of the consideration was before offering proof that it was inadequate.

The judgment is reversed and the cause remanded for a new trial.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
OCTOBER TERM, 1876.

[No. 786.]

THE STATE OF NEVADA, RESPONDENT, *v.* JAMES
JOHNSON, APPELLANT.

PLEA OF FORMER ACQUITTAL.—WHEN SHOULD BE ALLOWED.—Where the defendant interposed a plea of former acquittal in the exact form prescribed by the statute (Comp. L. 1921): *Held*, that the court erred in refusing to allow the plea to be entered of record.

IDEM.—It was not for the court to decide in advance that the plea of former acquittal could not be established. That issue was for the jury, subject, of course, to the right of the court to decide upon the competency and relevancy of the evidence offered in support of the plea.

PLEA OF FORMER JEOPARDY.—*Held*, that although the plea of former jeopardy might have been superfluous, as the facts set out in it might possibly have been given in evidence under the general issue, or if not, then under the plea of former acquittal, it would have been better, if the facts disclosed by it amounted to a defense, to allow it to be entered.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The facts are stated in the opinion.

W. C. Van Fleet, for Appellant.

I. The court erred in excluding defendant's pleas from the record, and depriving him of the right of being tried thereunder, as shown by the bill of exceptions. The court had no authority to refuse to let defendant's pleas be en-

Argument for Respondent.

tered of record. The provision of the statute is clear and unequivocal upon the subject. It is mandatory, and leaves the judge no discretion in the matter. (Sec. 1920, Comp. Laws.)

II. If defendant's pleas were bad or insufficient in law for any reason, although our statute makes no express provision for such a contingency, the rule at common law was for the state to demur. (Hab. Pl. chap. 33; Archbold's Crim. Pl. chap. 3; Starkies' Crim. Pl. chap. 19.) But here, there was no demurrer; no action whatever on the part of the prosecution to raise any question as to the sufficiency in law or fact of defendant's pleas. The pleas were good and expressly allowed by law, two of them being in the express language of the statute (vol. 1, ch. 1921), and as to plea of former jeopardy, vol. 1, Bish. Cr. Pr. chap. 56, sec. 818, *et seq.*, and defendant had an absolute right of which he could not lawfully be deprived, to have his pleas tried by a jury, and without such a trial and a verdict upon each plea there could be no valid conviction. (*People v. Kinsey et al.*, Cal. Sup. Ct., Jan. Term, 1876.)

J. R. Kittrell, Attorney-General, for Respondent.

I. Appellant relies on a pretended plea of *autre fois acquit*. Before he can avail himself of such a plea, it must appear that such was interposed at the proper time, and that it was in the form prescribed by statute. (Vol. 1, C. L. sec. 1921.) Every plea must be oral. (47 Cal. 122; 1 vol. C. L. sec. 1920.)

II. The record does not show that such plea to the indictment on which appellant was tried was ever interposed. The record in this case contains no copy of the indictment alleged to have been found against defendant by the grand jury of Elko county, on the twenty-second day of October, 1875; hence there is no evidence contained in the so-called bill of exceptions to warrant the court in considering the question of the validity or invalidity of said indictment. Before it can be successfully maintained that defendant has been once in legal jeopardy, three things must be made to appear: First. That the indictment upon which he was to

Opinion of the Court—Beatty, J.

be tried was a valid one; second, that the jury to try the case was duly impaneled, sworn and charged with the case; and, third, that they were discharged by the court without a legal necessity. None of these essentials is shown either in the minutes of the court or by the pretended bill of exceptions. The facts ought to be shown by the record, i. e., the indictment should be set out *in extenso*, and the minutes of the court should show that the jury was impaneled, sworn and charged with the case; they have no place in a bill of exceptions either by way of recital or otherwise. There would be just as much propriety in reciting them in the judgment. (*People v. Phillips*, 45 Cal. 44.)

III. Inasmuch as the indictment referred to in the pretended bill of exceptions is not before the court, it is to be presumed that the action of the court in setting it aside was regular. Error cannot be presumed, but must be affirmatively shown. (*People v. Best*, 39 Cal. 690; *People v. King*, 27 Id. 507; *People v. Winters*, 29 Id. 659.)

IV. All omissions and uncertainties in a bill of exceptions are to be construed against the party presenting it. (*People v. Williams*, 45 Cal. 25.)

By the Court, BEATTY, J.:

In this case the defendant appeals from a conviction of grand larceny. At the time of his arraignment he offered, together with a plea of not guilty, two special pleas. The first of these was what may be called a plea of former jeopardy. It sets out with great fullness and particularity, that the defendant had been formerly indicted for the same offense; that to that indictment he had pleaded not guilty; that a jury had been duly impaneled, sworn and charged with the case, and thereafter discharged before finding a verdict without his consent and without any legal necessity. This plea comes fully up to any precedent of such a plea that we have found, except that it merely refers to the former indictment as of record in that court instead of reciting its terms.

The other special plea was a plea of former acquittal in

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the exact form prescribed by the statute, (C. L., sec. 1921.)

The court refused to allow these pleas to be entered of record, and, when the defendant declined to plead further, ordered a plea of not guilty to be entered, upon which he was tried and convicted.

The error assigned by the defendant is the rejection of his special pleas. We think it was error. The plea of former acquittal was certainly well pleaded, and should have been entered. (C. L., sec. 1920.) It was not for the court to decide in advance that it could not be established. That issue was for the jury (C. L., secs. 1936-37), subject of course to the right of the court to decide upon the competency and relevancy of the evidence offered in support of the plea. It may be true that the defendant never had been acquitted of the offense for which he was indicted, but neither the district court nor this court can say so. He had a right to offer the plea along with his plea of not guilty (C. L., sec. 1919), and to have the issue submitted to a jury, if he could adduce any evidence tending to support it. Whether he could have adduced such evidence, we repeat, could not be decided in advance of the offer to do so, and he could not offer the evidence without having entered the plea. For this error the judgment must be reversed.

As to the other special plea of former jeopardy, it was perhaps unnecessary to offer it as the facts set out in it might possibly have been given in evidence under the general issue (C. L., sec. 1925); or if not, then under the plea of former acquittal. We think, however, that although this plea may have been superfluous, if the facts disclosed by it amounted to a defense, it would have been better to allow it to be entered. It was the safer practice to offer it. Its reception could have done no possible harm, and would have given the state the advantage of knowing what was the defense relied on.

We do not decide whether or not the facts alleged in the plea of former jeopardy would constitute a good defense to the present indictment. The question will be involved in

Statement of Facts.

the future proceedings in the case, but it is of too much consequence to be decided without argument, and it has not been argued here.

Judgment reversed and cause remanded for further proceedings.

[No. 767.]

J. S. DICKSON AND WM. ANDERSON, RESPONDENTS, v.
DANIEL G. CORBETT, APPELLANT.

FORECLOSURE OF MECHANIC'S LIEN—PLEADINGS.—Where the complaint states a case for relief, alleging that the work was done and the materials furnished at the special instance and request of one J. J. Bennett, the agent of the defendant, and where none of the allegations in the complaint were denied: *Held*, that a plea that "plaintiffs ought not to be allowed to maintain this action, for that on the — day of May, 1875, they obtained a judgment for the same debt against J. J. Bennett," constitutes no defense to the action.

IDEM.—The fact that plaintiffs recovered a judgment against Bennett only proves that Bennett made himself also personally liable on the contract which he entered into on behalf of his principal.

AGENCY, WHEN MUST BE DENIED.—The argument of appellant is, that Bennett was not his agent but his tenant, and had no authority to bind him or his estate: *Held*, that if this was true appellant should have alleged the facts in his answer.

MECHANIC'S LIEN—DESCRIPTION OF PREMISES.—Where the complaint described the property as a large building on certain lots in a certain block belonging to the defendant, together with a convenient space of land around the same: *Held*, that the description was sufficiently specific.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This case was originally brought in the justice's court to foreclose a mechanic's lien upon the following described real estate, situate in the county of Ormsby, state of Nevada, and more fully described as follows, to wit: Being a large structure on block 66, lots 3, 4, 5, 6, 7 and 8 of Musser's Division of Carson city, opposite the United States mint, and belonging to D. H. Corbett, together with a convenient space of land around the same.

The other facts are stated in the opinion.

Opinion of the Court—Beatty, J.

Thomas H. Wells, for Appellant.

I. Respondents had no right to maintain any action against appellant upon the cause of action herein alleged. Their original cause of action, their account, had been extinguished by their judgment obtained thereon against Bennett, in the justice's court, in which they proved, to the satisfaction of the court, that Bennett, not Corbett, was the one for whom they worked and who owed them the debt. When they sued Corbett on the same cause of action, they did not cancel, satisfy or release said judgment, or offer to do so, or pray that it be done, or plead any fraud or mistake, in the obtaining of it, which should relieve them from being bound by it. They cannot obtain a second judgment for the same debt while the first remains in full force and effect. It is apparent from the record that the lien, if they had the right to put one on anything, after suing and obtaining a judgment, might have been, and ought to have been, put upon the *interest*, the leasehold estate of Bennett, in the property set out in the lien.

II. The judgment is erroneous, because the record shows that no proof was ever offered to support the validity of the claim or of the lien. The judgment was rendered as if by default in a suit simply for money due on debt.

III. Section 14 of the lien act does not mean to give two remedies at one and the same time, in cases of this class, any more than in contract mortgage cases. It means that, though a party may have taken and filed his lien, he may, before suit brought to enforce, waive that remedy and bring his personal action to recover the debt. (27 Cal. 358; 32 Id. 176; 10 Id. 22; 30 Blkst. Com. 302.)

Robert M. Clarke, for Respondent.

Plea is not good. (Lien Law, Stat. 1875, p. 124, sec. 14; 16 Cal. 140; 2 B. Munroe, 257; 8 Id. 429; 4 Md. 269; 8 Johns, 361; 4 Md. Ch 75; 2 Id. 1.

By the Court, BEATTY, J.:

This is the same case in which a motion to dismiss the appeal was overruled at the January term, (10 Nev. 439.)

The appeal is from the judgment, and but one question arises upon the record: Did the court err in sustaining the motion of plaintiffs for judgment on the pleadings?

The suit is to foreclose a mechanic's lien and was commenced in a justice's court. It is not pretended that the complaint does not state a case for the relief decreed. It alleges *inter alia* that the work was done and the materials furnished at the special instance and request of one J. J. Bennett, the agent of the defendant. No allegation of the complaint is denied in the answer, the defendant relying solely on the following plea: "Plaintiffs ought not to be allowed to maintain this action for that on the — day of May, 1875, they obtained a judgment for the same debt against J. J. Bennett in this court." The defendant had judgment in the justice's court, but on appeal to the district court the plaintiffs recovered a judgment on the pleadings, from which the defendant appeals; and the sole question for our decision is whether the plea, admitting it to be true, avoids the original liability which the defendant has admitted by failing to deny the allegations of the complaint? We think it does not. The fact that plaintiffs have recovered a judgment against Bennett only proves that Bennett made himself also personally liable on the contract which he entered into on behalf of his principal, which he may have done by failing to disclose his agency or by the form of the contract. In such case Corbett is also liable, and an unsatisfied judgment against Bennett is no bar to an action against Corbett. Especially is this so when the object of this proceeding is not to obtain a personal judgment against Corbett, but to enforce the lien upon his property. He does not deny that his property was subject to the lien, but plants himself upon the bald proposition that the lien is extinguished by an unsatisfied judgment against his agent. We have been cited to no authority, and we know of none which supports such a view. Appellant suggests in his argument that Bennett was not his agent, but his tenant, and had no authority to bind him or his estate. If this is true, it should have been so stated in the answer. As the record

Argument for Appellant.

stands, Bennett's agency is admitted, and we can look to nothing else.

It is said to have been an error in the district court to make the decree without any testimony as to the part of the premises subject to the lien. But as to this matter, we think the complaint was sufficiently specific, and the decree follows it.

Judgment affirmed.

11	280
13	242

11	280
23	75

[No. 792.]

DUNCAN L. THOMAS, APPELLANT, v. J. D. SULLIVAN
ET AL., RESPONDENTS.

STATEMENT ON MOTION FOR NEW TRIAL CANNOT BE CERTIFIED TO AFTER APPEAL IS TAKEN.—Where the court below allowed and settled a statement after action upon the motion for new trial and after an appeal was taken: *Held*, that the court had lost jurisdiction by the appeal and that the statement on motion for new trial must be disregarded.

IDEM—EFFECT OF ORDER PREMATURELY MADE.—The effect of the reversal of an order granting a motion for a new trial, when the reversal results from the fact that the decision was prematurely made, is to leave the motion still pending in the court below to be regularly and properly disposed of.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

D. E. Bailey, for Appellant:

I. The court erred in granting defendant's motion for a new trial, when there was no certificate attached to the statement on motion for new trial, as required by law. Under the practice act and the decisions of the supreme courts both of this state and California, there was no motion or statement for a new trial on which the judge of the court below acted, when the order was made. (Comp. L., vol. 1, sec. 1258; *White v. White*, 6 Nev. 20; *Dean v. Pritchard*, 9 Id. 332; *Morris v. De Celis*, 41 Cal. 331; *Waggenheim v. Hook*, 35 Id. 216; *Cosgrove v. Johnson*, 30 Id. 509.)

II. If the statement was properly authenticated as required

Argument for Appellant in reply.

by law, there is nothing in the evidence adduced upon the trial which would warrant the judge in the court below granting the order on motion for a new trial. The new trial was granted by the court below on the ground of the insufficiency of the evidence to justify the verdict, and upon that alone.

Hillhouse & Davenport, for Respondent.

I. We concede that there are some authorities in this state which authorize the appellate court to refuse to examine a statement on motion for new trial that is not properly certified to before an appeal is taken, and without asking that these decisions be reversed, we think we can suggest a remedy by which the evil results of such a course of decisions can be avoided. We submit herewith the affidavit of the district judge who granted the new trial herein. On that, we ask that what purports to be a statement on motion for new trial be considered on this appeal, as it was upon motion for new trial; or if, under the decisions, this court should think this would, to some extent, unsettle the practice, then let an order be made reversing the order granting a new trial and remanding the matter, with instructions to re-submit the motion to the judge who decided the motion, with leave to him to certify to the statement and decide the motion.

In all the cases where these technical objections have prevailed, we find no affidavit, and nowhere is there any request to remand the case, with instructions to re-submit motion. We refer the court to sec. 1131, Comp. L. of Nevada, and to the case of *Flynn v. Cottle* (47 Cal. 526).

D. E. Bailey, in reply.

I. The respondents, in their brief, virtually admit that the points made by appellant are correct, and seriously ask that the case be re-submitted to Judge McKenney. There is nothing in the statute to warrant such practice, and the case cited by counsel of *Flynn v. Cottle* (47 Cal. 527), does not even suggest any such proceeding. This method, however, was suggested to this court by counsel for appellants in the

Opinion of the Court—Beatty, J.

case of *Dean v. Pritchard*, but was answered by the court citing the case of *Caples v. Central P. R. R. Co.* (6 Nev. 271-2.)

All the authorities hold—and there is no conflict—that when a motion for a new trial is granted on a defective statement, it is the same as if no statement had been filed, and there is no foundation for such an order.

By the Court, BEATTY, J.:

In this case the plaintiff appeals from an order granting a new trial; the principal ground of the appeal being that the court erred in granting the motion “when there was no certificate attached to the statement on motion for new trial as required by law.” It appears from the record that the motion was granted September 13, 1875; that this appeal was taken and perfected on the eighteenth of October following, and that on the next day, October 19, 1875, the district judge attached the following certificate to the “engrossed statement” on motion for new trial:

“The foregoing statement is correct, and has been allowed by me. I make this certificate of the date of September 13, 1875, on motion of counsel for defendants. This statement was settled by me and is correct. I further certify that this statement was settled in Eureka county, Nevada, before me with both parties present, and that the motion for new trial was submitted to me on this statement by consent of attorneys for the respective parties. Dated October 19, 1875. D. C. McKenney, D. J.”

This certificate having been made after the district court had lost jurisdiction of the case for that purpose, we are compelled to wholly disregard the statement to which it is affixed, and as there is nothing to support the order granting a new trial, it must be reversed. The cases of *Lamburth v. Dalton* and *Dean v. Prichard*, are precisely in point. (9 Nev. 66 and 232.)

But counsel for respondents, upon a suggestion of the circumstances under which their motion was decided, ask that, in case the order is reversed, the cause be remanded, with directions to the district judge to make a proper certi-

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ficate to the statement, and then to decide the motion for a new trial.

The circumstances so suggested are set forth in an affidavit of the district judge filed in this court, from which it appears that at the time this case was tried, Judge McKenney was judge of the sixth district, embracing Eureka county; that the case was tried at Eureka, and the statement on motion for new trial settled by him and ordered engrossed, that shortly after the settlement of the statement, and before its engrossment, he ceased to be judge of the sixth district and became judge of the fifth district, which does not embrace Eureka county; that subsequently the engrossed statement and the motion for new trial were submitted to him at Austin; that his decision of the motion, together with the engrossed statement, was returned to Eureka, he having failed, through inadvertence, to affix his certificate to the statement, and that he afterwards made the certificate of October 19, above quoted.

These suggestions, and the application of respondents founded thereon, present a question which has never been considered by this court; that is, what is the effect of the reversal of an order granting a motion for a new trial when the reversal results solely from the fact that the decision of the motion was prematurely made? Does it forever destroy the right of the moving party to proceed with his motion? Or is its effect limited to the order irregularly and prematurely entered, leaving the motion still pending in the court below, to be regularly and properly disposed of? The latter view is sustained by the case of *Morris v. DeCelia* (41 Cal. 331), and is not opposed by any decision of this court. The point was involved, perhaps, in the cases of *Lamburth v. Dalton* and *Dean v. Pritchard*, but it was not presented to the court, and of course not passed upon. In this case, however, the respondent presents the point by the facts suggested, and his request that upon a reversal of the order appealed from the case be remanded for further proceedings. We think that if the facts suggested are true, the case should be remanded. They are not precisely those presented by the case of *Morris v. DeCelia*, but they involve the same principle. It was there decided that when

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the district court has granted a motion for a new trial before settling the statement, and before the motion has been submitted, it is proper to move in the district court to vacate the order; and if that motion is denied, though the ruling of the district court must be reversed on appeal, the cause will be remanded "for further proceedings for the orderly determination of the motion for a new trial."

If the motion in this case was decided before it was submitted, or what is equivalent to the same thing, if it was decided without complying with the conditions upon which it was submitted, it was prematurely decided, and the inadvertence of the judge ought not to prejudice the moving party. Now what were the conditions upon which the motion was submitted? There were no *express* conditions, but there were conditions clearly implied. The engrossed statement was sent from Eureka to Austin, and submitted to the district judge at the same time that the motion was submitted. It was clearly his duty to attach the proper certificate to the statement before he decided the motion, and it must have been the understanding on both sides that he would do so. The submission was therefore a conditional submission, a submission upon the understanding that the statement should be settled before the decision of the motion.

But the district judge, through inadvertence, decided the motion first, and before the defendants discovered and had time to remedy the inadvertence, the plaintiff took and perfected his appeal, and now claims that he has by that means forever deprived the respondents of any opportunity of having their motion decided upon its merits. We think, that if the facts are as suggested, he is mistaken in that view. We must undoubtedly reverse the order of the district court, but we only reverse *that order*. If there is nevertheless a motion for a new trial regularly pending, and if that motion has never been decided in accordance with the terms of its submission, there is nothing to prevent the district judge from now settling and certifying the statement and then deciding the motion upon its merits.

The order appealed from is reversed and the cause remanded.

[No. 808.]

WILLIAM ARRINGTON AND M. B. BARTLETT, PLAINTIFFS, v. F. R. WITTENBERG, DEFENDANT.**FORECLOSURE OF MECHANICS' LIEN—SECTION 345 OF PRACTICE ACT CONSTRUED.**

—In construing section 345 (1 Comp. L. 1406): *Held*, that there is nothing in the section that requires an undertaking, in an action to foreclose a mechanics' lien, to secure the money part of the judgment in order to stay the order directing the sale of the property.

IDEM.—The only provision for a covenant in the undertaking to pay any deficiency arising upon the sale applies solely to cases in which the judgment is for the sale of mortgaged premises.

ORIGINAL Motion in Supreme Court for leave to issue an order of sale.

The facts are stated in the opinion.

Crittenden Thornton, for the Motion.

G. W. Baker, against the Motion.

By the Court, **HAWLEY, C. J.:**

The plaintiff obtained a judgment and decree of foreclosure of a mechanic's lien and an order of sale of certain real estate.

The decree recites a money judgment, and after directing a sale of the premises to satisfy said judgment, provides for the docketing of a judgment against defendant, for any balance that may be due to plaintiffs after the proceeds of said sale have been properly applied.

The defendant gave notice of an appeal to this court from said judgment and decree, and filed two undertakings on appeal. One being in the sum of three hundred dollars, conditioned to "pay all damages and costs which may be awarded" against the appellant, as required by section 341 of the civil practice act (1 Comp. L. 1402.) The other, in the sum of one thousand dollars (being the amount fixed by the judge of the district court, who rendered the judgment), conditioned "that during the possession of said property by said appellant, he will not commit, nor suffer to be committed, any waste thereon, during the time he is so in pos-

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session; and that we will pay to said Wm. Arrington and M. B. Bartlett, all damages which they may suffer by reason of the commission of any waste upon said premises during the time said appellant is in possession of the same." Upon this state of facts, the plaintiffs move this court for leave to issue an order of sale of the premises described in the decree of foreclosure and sale. Said motion is based upon the ground that said undertakings are insufficient in law to stay the execution and order of sale, for two reasons: First. Because "there is not any covenant or undertaking to pay the personal judgment." Second. Because "there is not any covenant or undertaking to pay any deficiency which may ensue upon a sale of the said premises."

We think the whole question rests exclusively upon the construction to be given to section 345 of the practice act, and, in our judgment, but one interpretation can be given to it. It reads as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, nor suffer to be committed, any waste thereon, and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment for a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency. In all other cases, not herein before mentioned, the amount of the undertaking to stay the execution of the judgment or order, shall be fixed by the court or judge thereof." (1 Comp. L. 1406.)

The motion is not for leave to issue execution upon the money judgment. In fact, no appeal was taken from that part of the judgment; but only from that part which estab-

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lishes a lien upon the property of defendant, and hence the only question for our decision is whether, under the provisions of the section above quoted, the undertakings are sufficient to stay the issuance of the order of sale. There is nothing in the section that requires an undertaking to secure the money part of the judgment, in order to stay the order directing a sale of the property. The only provision for a covenant in the undertaking to pay any deficiency arising upon the sale, applies solely to cases in which the judgment is for the sale of mortgaged premises. The statute in this respect clearly discriminates in favor of giving this security only "when the judgment is for the sale of mortgaged premises." No other liens are mentioned. The maxim *expressio unius est exclusio alterius* applies.

If the legislature had intended that mechanics' or other liens should be governed, in this respect, by the same rule as mortgages, it would have been so stated. The supreme court of California has given to a statute identical with the section quoted the same interpretation. (*Englund v. Lewis*, 25 Cal. 353.) The fact that section 248 of our practice act contains the words "or lien," in providing for actions for the foreclosure of mortgages, does not, in any manner, change or affect the interpretation to be given to section 345, upon which alone the points raised as to the sufficiency of the undertakings to stay the issuance of the order of sale, must be determined. We are of opinion that the undertaking to stay waste complies with the provisions of the statute, and is sufficient to stay the issuance of the order of sale.

The motion is denied.

[No. 807.]

EX PARTE W. C. RICORD.

EMBEZZLEMENT—SECTION 2380 COMPILED LAWS CONSTRUED.—In construing section 2380 of the compiled laws: *Held*, that money received by a clerk who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer.

IDEM.—Petitioner was an assistant of the agent of the Central Pacific R. Co., and had been held out to the public by the agent as having authority

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Argument for Petitioner.

to collect bills, and was enabled, by reason of the trust reposed in him by the company, to collect the company's money and discharge its debtors from their obligations to the company: *Held*, that although he had no general authority to collect all bills due the company he was, under the circumstances, intrusted by the company with the money which he collected.

IDEM.—It does not lie in the mouth of petitioner to deny that he had the authority which he claimed in order to collect the money, and which the confidence reposed in him by his employer enabled him to claim with success.

COMMITMENTS FOR EMBEZZLEMENT AND OBTAINING MONEY UNDER FALSE PRETENSES.—Where petitioner was held by the sheriff under a commitment of a justice of the peace for embezzlement, and while so held was taken before the district judge upon habeas corpus and the district judge, after hearing further testimony, made an order committing him to the custody of the sheriff for the offense of obtaining money under false pretenses: *Held*, that the order of the district judge did not, *ipso facto*, discharge petitioner from further custody under the warrant for embezzlement.

IDEM—SUPREME COURT HAS AUTHORITY TO ISSUE COMMITMENT.—Where a petitioner is brought before the supreme court upon a writ of habeas corpus, the court is authorized, if after examining the case it should be of opinion that petitioner was guilty of an offense other than that held, to issue a new commitment.

INDICTMENT FOR EMBEZZLEMENT.—A clerk may commit more than one embezzlement of his employer's money, and if he does he may be separately indicted for each separate offense.

IDEM—BURDEN OF PROOF.—If the money from different parties was all collected before any portion of it was converted, then petitioner committed but one offense; but the burden of establishing this fact is upon petitioner.

HABEAS CORPUS before the Supreme Court.

The facts are stated in the opinion.

Harvey S. Brown, M. S. Bonnifield, T. W. W. Davies and J. R. Kittrell, Attorney-General, for the State.

Robert M. Clarke, for Petitioner.

I. In holding Ricord to answer for the crime of "obtaining money under false pretenses" in the habeas corpus proceeding, Judge Bonnifield discharged him of the crime of "embezzlement."

Upon the same facts it is not possible that Ricord could be guilty of "obtaining money under false pretenses" and "embezzlement;" because "embezzlement" involves the

existence of an agency, and implies that the money came rightfully into his custody, and "obtaining money under false pretenses" involves the denial of an agency, and implies that the money came wrongfully into his custody. In truth, the officer restrains Ricord in virtue of the order of Judge Bonnifield, and by no other authority.

II. Judge Bonnifield had no authority to make the order committing Ricord to answer for the crime of "obtaining money under false pretenses," because he had not made an order appointing a time to examine such charge. (Hab. Corp. Act, sec. 22; C. L. sec. 370.)

III. Granting the authority to hear the matter, and the power to commit for the supposed offense, the evidence was insufficient to warrant the judge in holding Ricord to answer for the offense of "obtaining money under false pretenses." There was no false pretense unless in Ricord's representing himself to be the agent of the Central Pacific Railroad Company, with authority to collect the money. But Ricord was such agent, and had such authority, consequently there was no false pretense in the case. (See Crim. Act, sec. 187; 2 Bish. Cr. Law, secs. 399, 447, 460, 471; Whart. Cr. Law, secs. 2081, 2110.)

IV. Ricord had already been acquitted of the crime of embezzlement alleged to have been committed in the embezzlement of this money. Having been acquitted, he cannot again be tried. (1 Bish. Cr. Law, sec. 1048, 1051-2; 9 Yerg. 357; 4 Scam. 172.) The fact of former acquittal may be raised on habeas corpus, under that provision of the habeas corpus act which authorizes the court to discharge the prisoner "where a party has been committed without reasonable or probable cause." (Hab. Corp. Act, sec. 20; vol. 1 C. L. 113.) It certainly would have been a good bar if suggested to the magistrate, and why not when suggested to this court, on a re-examination of the complaint. (23 Cal. 571.)

By the Court, BEATTY, J.:

This is a proceeding upon habeas corpus. The petitioner alleges that he is illegally restrained by the sheriff of Hum-

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boldt county, and that the illegality of his confinement consists in this: that he was committed in default of bail by the Hon. W. S. Bonnifield, judge of the fourth district, on a charge of obtaining money under false pretenses, notwithstanding the fact that it was proven before said judge that he had been previously tried by a jury, and acquitted upon a good indictment for the same offense. And he alleges further that no reasonable cause exists or was shown to said judge why he should be committed or held to answer. The sheriff makes return to the writ that he holds the petitioner by virtue of two warrants; one a commitment for embezzlement issued by a justice of the peace of Humboldt county, the other the commitment of Judge Bonnifield, described in the petition. On the hearing before this court, the evidence taken and reduced to writing at the examination before the justice of the peace, the additional testimony taken and reduced to writing at the hearing before Judge Bonnifield, and a stipulation as to other facts were submitted together with the sheriff's return. From all of which it appears that J. E. Ragsdale is the agent of the Central Pacific Railroad Company at Winnemucca, in Humboldt county, and that the petitioner was for several months prior to June 8, 1876, his clerk or assistant. Among other duties of the agent at Winnemucca was that of collecting freight bills, and he testifies that he occasionally intrusted their collection to the petitioner. He says that he never gave him any general authority to collect such bills, but only a special authority in particular instances. The petitioner, on the contrary, states that he had a general authority to collect any and all bills due to the company, and it is not perfectly clear which version of the extent of his authority is correct. It is certain, at all events, that he was clothed with such appearance of authority as to protect those who paid their freight bills to him, from any further claim from Ragsdale or the company. This being the case, he collected, in the early part of June, 1876, several hundred dollars from Rheinhardt & Co., of Winnemucca, on bills for freight, which he receipted in the usual manner. With the money so collected, he absconded. He was after-

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wards arrested at Omaha, in Nebraska, brought back to Humboldt county, examined by a magistrate, and held to bail for embezzlement, as above stated. He thereupon sued out a writ of habeas corpus, upon which proceeding he was again examined before Judge Bonnifield, and held to answer for obtaining money under false pretenses, and committed in default of bail. It further appears that prior to these proceedings he was indicted for embezzling money of the Central Pacific Railroad Company, and upon that indictment tried and acquitted. Upon this showing, he asks to be discharged from custody. He contends in the first place, on the authority of *The People v. Bailey* (23 Cal. 577), that he cannot, in any view of the case, be deemed guilty of embezzlement. Section 2380 of our compiled laws is identical in language with the section of the California criminal code which was construed in the case of *The People v. Bailey*. It reads as follows: "If any clerk, apprentice, or servant, or other person, whether bound or hired, to whom any money or goods or chattels, or other property, shall be intrusted by his master or employer, shall withdraw himself from his master or employer, and go away with the said money * * * with intent to steal the same, he shall be deemed guilty of embezzlement." Under this statute, the supreme court of California held that no one could be guilty of embezzlement unless he received the money or property directly from the hands of his master or employer, and that when money was collected by the authority of the master from third parties, and fraudulently converted by the servant, the case did not come within the meaning of the statute. This conclusion was based upon a very narrow, and, we think, wholly unwarranted construction of the words "intrusted by his master or employer." Judge Norton dissented from this part of the opinion of the court, and gave the correct interpretation of the law in these concise terms: "I think money received by a clerk who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer." We have no hesitation in saying that the opinion of the court

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in *The People v. Bailey*, is not law, and that the petitioner in this case, if he had the authority which he claims to have had, was guilty of embezzlement.

But the petitioner contends that at all events he cannot be deemed guilty of both offenses, embezzlement and obtaining money by false pretenses; for, he says, he could not be guilty of embezzlement unless he had authority to collect the money, and if he did have such authority he was guilty of no false pretense. We think this is true, and that it devolves upon this court to say upon which charge he can be held, if upon either. In our opinion the testimony shows that he was guilty of embezzlement even upon Ragsdale's statement of the extent of his authority. He was Ragsdale's assistant, but he was the servant of the Central Pacific Railroad Company, and if he had no general authority to collect all bills due the company at Winnemucca, he had been held out to the public by Ragsdale and the company as having such authority, and payment to him was, so far as third parties were concerned, payment to the company. He was thus enabled by reason of the trust reposed in him by the company, and solely by reason of such trust, to collect the company's money and discharge its debtors from their obligation to the company. We think it may be fairly said that he was entrusted by the company with the money which he collected under such circumstances, and that at all events it would not lie in his mouth to deny that he had the authority which he claimed in order to collect the money, and which the confidence reposed in him by his employer enabled him to claim with success. But in truth he does not deny his authority. He insists that he had the authority, and that he was guilty of embezzlement and nothing else. And he claims that he is entitled to be discharged, because Judge Bonnifield's commitment for obtaining money under false pretenses cannot be sustained on the testimony, and because that order committing him for an incompatible offense, *ipso facto*, discharged him from further custody under the warrant for embezzlement. The last proposition we cannot concede. It may be true that Judge Bonnifield ought to have made an order discharging

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him from the first commitment before holding him to answer for the other offense, but the fact is he did not; and as it is the duty of the sheriff to hold the prisoner under that commitment until he is legally discharged, it follows that he is actually and properly holding him on both warrants, and unless we discharge him from custody under one warrant he will continue to be so held. But even if we thought the effect of Judge Bonnifield's order was to destroy the first commitment for embezzlement, we are clearly of the opinion that we have authority under the habeas corpus act to issue a new commitment, and we should feel bound under the circumstances to do so, unless it is shown that the prisoner has already been acquitted of this offense, as he claims to have been. On this point it is stipulated: "That an indictment was found against William C. Ricord charging him generally with embezzling money of the Central Pacific Railroad Company. That, on the trial of said indictment the prosecution first introduced proof to show embezzlement of certain money belonging to said company collected by Ricord from Levy & Co., and offered to introduce further proof concerning other sums of money collected as the agent of said company from other parties. That said Ricord by his counsel objected to the introduction of such further testimony on the ground that but one offense could be tried under said indictment, which objection was sustained by the court and no testimony was admitted except as to the money collected from Levy & Co. On the trial the defendant, Ricord, was acquitted."

The petitioner now argues that his objection to the testimony offered on his trial was erroneously sustained. He says the embezzlement of money consists in the wrongful conversion of it after its collection and not in collecting it. That he was guilty of but one embezzlement in converting the money, no matter from how many different parties he collected it, and, consequently, that his acquittal on one indictment is a bar to any further prosecution. There is no doubt, if his crime was embezzlement, and the money was all collected before any portion of it was converted, that he committed but one offense. But there is nothing to show

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that he did not convert the money collected from Levy & Co. before he collected any money from Rheinhardt & Co., and from the objection that he made, and the ruling of the court sustaining it, it is to be presumed that such appeared to be the fact. A clerk may commit more than one embezzlement of his employer's money, and for aught that appears, this petitioner may have done so, and if he did, he must, under our law, have been separately indicted for each separate offense. The burden was upon him to show the identity of the offenses, and he has not shown it.

Counsel for petitioner has cited the court to the text of Bishop's Criminal Law, and to the cases of *Hite v. The State* (9 Yerger, 357), and *Durham v. The People* (4 Scam. 172), as authority for the proposition that an acquittal on one indictment is necessarily a bar to any other indictment, when the same proof would support both. From this they argue that the facts proved upon the present charge against Ricord would have supported the indictment upon which he was acquitted, and consequently, that he never can be convicted on such facts. But the cases cited do not sustain the proposition upon which this argument is built. A plea of former acquittal, before our statute, was required, in addition to a recital of the record in the former case, to aver that the offense charged in the two indictments was, as matter of fact, the same identical offense, and that the defendant in both was the same person. In the Tennessee case this was the form of the plea, and it is to be presumed that it was pleaded in the same form in the Illinois case. In both cases the question before the court was purely a question of law, whether the plea was well pleaded. In Illinois, the question was raised by a demurrer to the plea, and, of course, the test of its sufficiency, admitting it to be true in point of fact, was whether the same testimony would support both indictments. The court held that it would, and sustained the plea. In the Tennessee case, the commonwealth replied *nul tiel record*, and the issue was tried by the court, treating the replication as if it had been a demurrer. The court held, on comparison of the two indictments, that the same evidence would not support both, and overruled

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the plea. The truth is, that the rule amounted to this: The plea was bad if the same proof would not support both indictments, but it was not necessarily good if the same proof would support both indictments. The further allegations of identity of offense in fact, and of identity of defendant, were essential, and if put in issue had to be proved.

The facts stipulated in this case do not establish, or tend to establish, the identity of the offense with which the petitioner is now charged with that of which he was acquitted.

Let the prisoner be discharged from the warrant for obtaining money on false pretenses, and remanded upon the warrant for embezzlement.

[No. 813.]

EX PARTE W. D. ISBELL.

HABEAS CORPUS, SECTIONS 581 AND 583 CRIMINAL PRACTICE ACT CONSTRUED.

Where petitioner had been held to answer before the grand jury for the crime of murder, the grand jury had met and ignored the charge, and the court, upon sufficient cause shown, ordered that he be held to appear before the next grand jury: *Held*, that petitioner was not entitled to his discharge under the provisions of sections 581 and 583 of the Criminal Practice Act (1 Comp. L. 2206, 2208) upon a writ of habeas corpus.

IDEM.—ORDER SUBMITTING CASE TO ANOTHER GRAND JURY.—DISCRETION OF JUDGE.—Where it appears that the court adjudicated upon the facts, the presumption arises that the facts were of such a character as to warrant the court in the exercise of its sound legal discretion to make the order.

IDEM.—RECITALS IN RECORD.—It being recited in the record that the order resubmitting the case to the next grand jury, was made because "sufficient cause" was shown, the presumption is, in the absence of any showing to the contrary, that the court did not act arbitrarily in the premises.

HABEAS CORPUS, WHEN WRIT SHOULD NOT ISSUE.—When it appears from the facts set out in the petition, that there is no sufficient ground to grant the relief asked for, the writ should not be issued.

ADMISSION TO BAIL UPON CHARGE OF MURDER.—A *nisi prius* court has the right, upon the application of a petitioner, who is charged with murder, and whose case has been resubmitted to another grand jury, to hear the testimony and decide for itself whether the proof of defendant's guilt was evident or the presumption great.

IDEM.—APPLICATION TO OTHER COURTS.—When it appears that the presiding judge has acted upon petitioner's application for bail, no other court or

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judge would be warranted in discharging petitioner or admitting him to bail, unless it clearly appeared that the presiding judge had acted arbitrarily in the premises.

APPLICATION for a writ of habeas corpus before HAWLEY, C. J., at Chambers.

The facts are stated in the opinion.

W. N. Granger, for Petitioner.

HAWLEY, C. J. This is an application for a writ of habeas corpus. The petitioner claims that he is unlawfully imprisoned, detained, confined and restrained of his liberty by the sheriff of Nye county. In his petition he shows that he was confined in the county jail of Nye county by virtue of a commitment issued on the tenth day of August, 1876, by a justice of the peace of said county, charging him with the crime of murder; that a grand jury of said county was thereafter regularly impaneled and sworn; that after examining the charge against petitioner, the grand jury, on the twenty-third day of August, 1876, reported to the district court that they found no bill against the petitioner, and that thereupon the court made the following order: "It is hereby ordered that * * W. D. Isbell * * be held to appear before the next grand jury of Nye county, Nevada, upon sufficient cause having been shown the court why the case of the State of Nevada against said parties should be resubmitted to another grand jury. And it is further ordered, that the sheriff of Nye county, Nevada, do keep and hold said parties in custody until such meeting of the next grand jury, and proceedings thereby, or to the further order of this court or judge."

That on the twenty-fourth day of August, 1876, petitioner applied to the judge of the district court to be admitted to bail, and his application was denied. The petitioner contends that these facts show that his present confinement and restraint is illegal, and he asks "to be either discharged from such confinement and restraint upon his own recognizance or admitted to bail." This application is based upon the provisions of sections 581 and 583 of the

criminal practice act. Section 581 reads as follows: "When a person has been held to answer for a public offense, if an indictment be not found against him at the next term of the court at which he is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown." (1 Comp. L. 2206.)

Section 583 provides, among other things, that if the defendant be not indicted as provided in section 581, "and sufficient reason therefor be shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own recognizance, or on the recognizance of bail, for his appearance to answer the charge at the time to which the action is continued." (1 Comp. L. 2208.) There is nothing in either of these sections that would authorize me to grant the relief asked for, upon the facts presented in the petition. Petitioner would only be entitled to his discharge upon the ground that no good cause had been shown to warrant the court in making the order resubmitting the cause to the next grand jury. "Sufficient cause having been shown," is recited in the record as the reason why the order was made. From this it appears that the court adjudicated upon the facts presented before it, and the presumption necessarily arises that the facts were of such a character as to fully warrant the court, in the exercise of its sound legal discretion, to make the order.

In *Ex parte Bull* it appeared from the record that upon the motion of the district attorney an order was made, upon the recommendation of the grand jury, that the petitioner be held to answer before the next grand jury, and that no other or further cause was shown. The supreme court discharged the petitioner because the circumstances upon which the court acted in detaining him were "wholly and absolutely insufficient to support the order." Wallace, J., in delivering the opinion, after citing the provisions of the statute (identical with the statutes of this state) says: "The case in which a dismissal of the prosecution is not to follow upon the non-presentment of an indictment against the accused is exceptional, the accused has a right to

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depart, unless good cause to the contrary be shown." This general provision of the statute, that the prisoner is not to be held indefinitely, is designed to secure to him a speedy trial; and this right is absolute, except some good cause be shown which may be supposed to take the case out of the operation of the general rule. What is "good cause," may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. There should, undoubtedly, be some fact or circumstance disclosed to the court upon which its authority in this respect, somewhat discretionary, could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge or information as would enable it to determine for itself whether or not public justice requires the further detention of the prisoner, notwithstanding the delay upon the part of the prosecution. It must be admitted, too, I think, that ordinarily this discretion, when exercised by the court to which the law has intrusted it, is not subject to review, and that when exercised, the sufficiency or insufficiency of the grounds upon which it proceeded could not be examined here through the instrumentality of a writ of habeas corpus. The presumption that the discretion had been correctly exercised would ordinarily arise, if the record should state in terms that good cause appeared; so, too, if the record should recite a particular fact, or several facts, as being the facts upon which the court had proceeded in ordering the detention of the prisoner, the import of such fact or facts as being sufficient or insufficient to amount to 'good cause,' would not be accurately weighed in this proceeding; it would rather be presumed that there were other existing facts not affirmatively disclosed upon the record which would support the action of the court in making the order." (42 Cal. 199.)

This is, in my judgment, a very clear and correct interpretation of the general rule that ought to govern courts in deciding cases of this character. Applying these rules to the case under consideration there is no difficulty in determining what ought to be done with this application. The

court below having stated that the order, resubmitting the case to the next grand jury, was made because "sufficient cause" was shown, I am bound to presume, in the absence of any showing to the contrary, that it did not act arbitrarily in the premises. As it appears, from the statements set forth in the petition, that there is no sufficient ground to grant the relief asked for, it is my duty not to issue the writ. (*Ex parte Deny*, 10 Nev. 213.) The petitioner bases his right to be admitted to bail, solely under the provisions of the statute upon the facts set forth in his petition, and it seems to me quite clear that he is not, upon such facts, as matter of right, entitled to be admitted to bail by virtue of said provisions. Having been charged with murder and committed for that offense, petitioner is not entitled to bail if "the proof is evident or the presumption great." (1 Comp. L. 2123.)

Ordinarily, the fact that a grand jury has investigated the charge and refused to find a bill ought to be sufficient to satisfy a court that the proof is not evident nor the presumption great, but notwithstanding such action upon the part of the grand jury the court, in a case like this, would have the right, and it would be its duty, upon the application of petitioner, to hear the testimony and decide for itself whether the proof of the defendant's guilt was evident or the presumption great. This is a question upon which courts and judges are invested with a legal discretion, which is, at all times, to be exercised with sound judgment upon a full consideration of all the facts and circumstances of each particular case, and when it appears that the presiding judge has acted, no other judge would be warranted in discharging the petitioner or admitting him to bail, unless it clearly appeared that the presiding judge had acted arbitrarily in the premises and thereby abused his discretion.

The writ is denied.

Argument for Relator.

[No. 772.]

THE STATE OF NEVADA, EX REL. W. W. HOBART,
STATE CONTROLLER, RELATOR, v. G. W. HUFFAKER,
TREASURER OF WASHOE COUNTY, RESPONDENT.

PENALTY FOR NON-PAYMENT OF TAXES.—In construing the act approved March 7, 1873, (Stat. 1873, 169): *Held*, that the penalty of twenty-five per centum follows the tax, that five-thirteenths of the penalty belongs to the state and eight-thirteenths to the county.

MANDAMUS before the Supreme Court.

The facts are stated in the opinion.

Robert M. Clarke, for Relator.

I. The twenty-five per centum penalty imposed is neither in the nature of costs nor tax; but it is a sum imposed partly by way of punishment, but chiefly by way of inducement to influence the taxpayer to pay his taxes without suit. It is a sum which the State had the right to impose and dispose of at pleasure; to appropriate to its own use as clearly as to appropriate the ten per cent. to the use of the county. (22 Cal. 365, 370), and when rightfully imposed and not otherwise disposed of, it of necessity belongs to the state.

II. The legislature having enacted *two penalties*, and having expressly provided that *one* should go to the county, and having made no such provision as to the other, it is to be inferred that they did not intend the other should go to the county; otherwise they would have enacted in the second, as in the first case: *Expressio miras est exclusio alterius*.

III. The state having a judgment in its name and favor, for the sum of money in controversy, and there being no provision of law giving it to the county, or authorizing the respondent to withhold it from the state treasury, the respondent must pay it into the state treasury with the balance of the judgment, of which it forms a part, under the law which requires him to send to the treasurer of state all funds which shall have come into his hands as county treasurer, for the use and benefit of the state. (Comp. Laws, sec. 3198.)

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Argument for Respondent.

Thomas E. Haydon, for Respondent.

I. The statutes (art 3149, C. L., last proviso,) gives to the county, for its use, the original ten per cent. penalty incurred by a taxpayer by failure to pay his taxes before the first of December in each year.

The act of March 7, 1873, (art 3238, vol. II, Comp L.,) prescribes in cases where the amount of tax exceeds three hundred dollars on suit brought, a penalty of twenty-five per centum in addition to such original penalty of ten per cent. provided for in the revenue laws. Statutes *in pari materia* construed together. (*Ford v. Hoover*, 5 Nev.; *V. & T. R. R. Co. v. Commissioners of Ormsby Co.*, 5 Id. 341; *Sedgwick on Statutory and Const. Laws*, chap. 6, with citations from *Vattel & Donat*; *Brown v. Davis*, 1 Nev. 413; *Torreyson v. Board of Examiners*, 7 Id. 22.)

The words, twenty-five per cent. in addition to the original penalty of ten per cent., are conclusive of the right of the county to the twenty-five per cent. added to the ten original per cent. The word add, in all its grammatical changes in English, implies a principal or pre-existent thing to which another thing is to be annexed, making together, a whole sum, mass, number, or aggregate, setting or putting together, joining, united, increasing or augmenting the addition, to the principal or pre-existing thing.

The etymology from the compound latin verb adds—from *ad* and *do*—give to,—but confirms the above definition or meaning. The words of a statute are construed in their popular meaning, except where technical terms are used. (*Ormsby Co. v. State of Nevada*, 6 Nev; *Brown v. Davis*, 1 Id. 413; *V. & T. R. R. Co. v. Lyon Co.*, 6 Id. 285-6.) The usual and most known signification of the words “additional penalty” imports the augmentation or increasing of the penalty pre-existing, the conditions upon which imposed, and the uses to which appropriated are all supposed or presumed to have been already exactly prescribed. (1 *Wend.*; *Blackstone*, 59.)

II. In cases of doubtful construction, the debates of congress or legislatures may be resorted to to establish the meaning of a statute, and the objects of the legislature in

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adopting it. (*Maynard v. Johnson*, 2 Nev. 26; *Morris v. Melin*, 6 Barn. & Cress, 446 *et seq.*)

Harris & Coffin, also for Respondent.

I. The use of the penalty resulted to the counties by the mere force of the statute which imposed it, and provided for its collection and payment in the first instance into the county treasury. It becomes *county money* for the reason, to say the least, that the legislature has *ex industria*, throughout the statute concerning revenue, carefully defined the state's proportion of the money arising from certain specific sources of revenue, and has clearly defined the duty of the several county treasurers relative thereto in the way of payment to the state treasury, while there is an entire omission to provide or declare in any manner what, if any, is the right, or proportional right of the state to any moneys whatever received into the county treasuries by way of penalties for delinquency. The duty of the county treasurer is clearly defined in section 75 of the act. (Art. 3197, Comp. L.)

II. The disposition to be made of the twenty-five per cent. penalty is as positively provided for as that of the ten per cent. penalty, when the true reading of the two statutes is attended to. It goes into the county treasury for county purposes.

By the Court, BEATTY, J.:

This is a proceeding by mandamus against the treasurer of Washoe county to compel him to pay into the state treasury the sum of \$5534.28, paid to him by the Central Pacific Railroad Company, under the provisions of "An act prescribing an additional penalty for non-payment of taxes in certain cases after suit," approved March 7, 1873, which reads as follows: "Section 1. In all suits for the collection of delinquent taxes originally brought in the district courts, where the amount exceeds \$300, the complaint and summons shall demand, and the judgment shall be entered, for twenty-five per centum, in addition to the tax, ten per centum thereon and costs provided in the act to provide revenue for the support of the government of the state of

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Nevada and the acts amendatory thereof; and such tax, penalty and costs shall not be discharged, nor shall the judgment therefor be satisfied, except by the payment of the tax, original penalty, costs, and the additional penalty herein prescribed in full." The sum of \$5564.28, above specified, is the twenty-five per centum additional penalty on the sum of \$22,257.13 which was recovered from the Central Pacific Railroad Company in a suit for taxes assessed in Washoe county, and the question is whether it belongs to the state or to the county. The relator contends that it belongs wholly to the state, and the respondent that it belongs wholly to the county. The question is one of statutory construction merely, and we think that both parties are partly in the right and partly in the wrong.

This penalty of twenty-five per centum is assessed upon the aggregate amount of taxes due to the state and county, of which five-thirteenths were due to the state and eight-thirteenths to the county. The law makes no express disposition of the penalty, and it becomes a question of construction what disposition of it the legislature intended. We think the penalty is to be regarded not only as a punishment to the delinquent, but also, and principally as a compensation to the state and county for the delay of payment, and the consequent derangement to their finances. So regarded, the obvious conclusion is, that the penalty follows the tax, in this case five-thirteenths to the state and eight-thirteenths to the county. The penalty of ten per centum, (C. L. 3148) to which this penalty of twenty-five per centum is additional, is expressly given to the counties, and from that circumstance the relator argues on the principle of *expressio unius, etc.*, that this penalty must go to the state, while the respondent comes to the exactly opposite conclusion that it must follow the express disposition of that to which it is additional. We think, however, that neither of these arguments, which to some extent destroy each other, is of as much weight as the consideration upon which we base our construction of the law above stated.

Let the writ be made peremptory that the respondent pay over five-thirteenths of the amount claimed in the petition, viz. \$5564.28.

 Points decided.

[No. 770.]

JOHN S. CAPRON, APPELLANT, v. W. H. STROUT,
ET AL., RESPONDENTS.

MECHANICS' LIENS — REPEAL OF OLD LAW AND PASSAGE OF NEW ACT. —

Where a law relating to mechanics' liens is repealed by a new law containing all the essential parts of the law repealed: *Held*, that the repeal of the old law does not destroy existing rights thereunder. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 220, affirmed.)

IDEM — FOREMAN OF MINE ENTITLED TO LIEN. — Where a foreman of a mine is employed to "boss" the men at work in a mine, keep their time and give them orders for their pay: *Held*, that his employment is of that kind that is protected by the lien law.

APPROPRIATION OF PAYMENTS. — Where the foreman of the mine also boarded men for the mine-owner, and at different times received money not exceeding amount due for board, no application being made by either party at the time of payment: *Held*, that the foreman at the time of filing his lien for work had the right to appropriate the money to the board account.

IDEM — MORTGAGEE NO RIGHT TO OBJECT. — *Held*, that the mine-owner and the foreman had the right to make the appropriation without consulting Capron, who held a mortgage on the mine, and that the mortgagee could not object to the manner of appropriation.

VERBAL CONTRACT AT STIPULATED PRICE PER DAY, PAYABLE MONTHLY, CONSTRUED. — Where a foreman of a mine is employed at a stipulated price per day, to be paid monthly, and when he continues work for more than one year after his employment without any new agreement being made: *Held*, a contract from month to month that might have been terminated by either party at the end of the month, without incurring any liability.

IDEM — RIGHTS OF MORTGAGEE — NOTICE OF LIEN-HOLDER. — Where the mine-owner mortgaged the property subsequent to the contract with the foreman for labor: *Held*, that all the work done by the foreman subsequent to the execution of the mortgage, after the expiration of his then current month, was done under contracts made by him after legal notice of the mortgage, and his lien for such work is subordinate to the mortgage.

MECHANICS' LIEN, WHEN MUST BE FILED — DIFFERENT CONTRACTS. — When the work is continuous, although done under different contracts, the lien is preserved by giving notice within sixty days after the work is completed. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 220, affirmed.)

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

Hillhouse & Davenport, for Appellant.

I. The law under which the lien is claimed was repealed March 2, 1875. (Stats. 1875, 122.) In *Skyrme v. Occ. M. & M. Co.*, this court, under the authority of Massachusetts and other cases, held, that the new law was a substitute for and took the place of the law repealed. The terms of the new were the same as the old, so far as the liens sought to be enforced were concerned; the new, then, only gave additional liens. In the present instance, the new law takes away the right of a lien holder, to have his lien attach from the commencement of the labor. The new law only allows a lien for labor when such labor was performed prior to the mortgage. The old dated the lien from the commencement of the labor. Then we find the new law curtailing the liens allowed under the old, instead of adding to them, as did the law considered in 8 Nevada. This repeal of the old law made the lien of laborers subject to mortgages, only so far as such labor was performed prior to such mortgages.

A lien law only gives a remedy, and is subject to the control of a legislature. (28 U. S. Digest, p. 393, sec. 1; 54 Maine, 345; 2 Kent, 852, note; 2 Wall., U. S. 458; 4 Minn. 546; 8 Id. 34; 35 Maine, 73.)

Where work is done partly under one lien law, and partly under another, the remedy is under the last law. (4 Scam. Ill., 527-535.) The lien is only statutory—only effects the remedy—and is entirely subject to the control of the legislature. The lien is a mere incident to the contract. (4 Minn. 546; 8 Id. 34; 54 Maine, 345.)

II. When Capron took his mortgage, he was only required to take notice of such legal valid contracts, as could, under the law, exist, upon which liens would attach. (See 26 Ill. 426; 4 Scam. Ill. 527-535.) When Stuart went to work for Stuart & Wermuth the contract was verbal; that contract cannot be implied by law to extend any time more than from day to day, or month to month; no express agreement was made for any particular time; so the law is left to imply a contract under which the lien will attach; that very law which is invoked to make the contract provides that no con-

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tract, unless in writing, shall be valid, unless to be performed within a year. Now Stuart went to work under a verbal contract. Capron is presumed to know the law: that verbal contracts cannot by implication extend beyond one year, because it could not be made valid for longer than that time by express agreement, unless such agreement was in writing. Verbal contracts cannot be made for a longer time than one year. (See Comp. L. of Nev., vol. 1, 90; Chitty's Cont., 71-2, also 503-504; 1 Hilliard on Cont., 415-16.) That a contract within the statute of frauds will not support a lien.) See Phillips on Mech. Liens, 162, sec. 112; 9 N. Y., 435.)

III. The contract under which Stuart worked is not entire, because not with the same parties. Entirety must mean something. The law distinctly says "this word denotes the whole," etc., entire, "that which is not divided, the whole." When a contract is entire, it must generally be performed before the party can claim compensation, etc. (See 9 Gray, Mass. 394; 21 Ill. 429-436; 35 N. Y. 96: 6 Gray, Mass. 533; 2 E. D. Smith, N. Y. 689; 2 Cal. 90; 26 Id. 235; 50 N. Y. 360; Phillips Mech. Liens, 15, 23, 168.)

IV. Capron had the right to take his mortgage, with reference to such lien as Stuart might have under a valid contract. (*Tobey v. Berley*, 26 Ill. 426; *Wilder v. French*, 9 Gray; *Cook v. Vreeland*, 21 Ill. 436.)

If the contract was verbal and could only be valid in law for one year, should not Capron, "a subsequent party in interest," have a right to insist upon its being restrained at that limit?

V. Under our law, "*laborers or persons performing labor*" are given the extraordinary remedy to collect their wages; but in this case, the act is sought to be made a security to a foreman of those who perform the labor. (See 40 Cal. 187; 4 Watts & Serg., Penn. 257.)

Thomas Wren, for Respondent.

I. The act of March 2, 1875, was not intended by the legislature to destroy rights that had accrued under it. The act re-enacts many of the provisions of the act of 1871. Its

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general provisions with reference to filing and enforcing the liens are substantially the same. It took effect simultaneously with the repeal of the act of 1871, and was intended to be substituted for it, and instead of annulling the act of 1871, it had the effect to continue it in force so far as existing rights thereunder were concerned. In practical operation and effect, therefore, it is rather to be considered as a continuance and modification of the act of 1871, than as an abrogation of it, and the re-enactment of a new one. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, and authorities there cited.) The Legislature could not divest Stuart of his vested right to a lien existing at the date of the repeal of the law of 1871. (*Christman v. Charleville*, 36 Mo. 610; *Hallahan v. Herbert*, 11 Abb. P. R. N. S. 326; *In re Hope M'g. Co.*, U. S. C. C. Rep., 1 Saw. 710; *Weaver v. Sells*, 10 Kan. 609.

II. The rights of parties under mechanics' lien laws are to be ascertained and fixed by the law in force when the contract was made, but such rights are to be established and enforced by the laws existing at the bringing of the suit. (Phillips on Mech. Liens, 35-6; *Willamette v. Riley*, 1 Oregon, 183; *Andrews v. Washburn*, 3 S. & M., Miss. 109.) In other words, Stuart, under the lien law of 1871, had a right to a lien from the time he commenced work up to March 2, 1875, but that right he had to establish and enforce in the mode prescribed by the lien law passed March 2, 1875, and that is precisely what he has done.

III. The law allows a lien not only to miners, but also to all other persons who work or labor upon a mine. Under similar statutes it has been frequently held that architects and superintendents of work are entitled to liens. (Phillips on Mech. Liens. 222, sec. 158; *Knight v. Norris*, 13 Minn. 473; *Mulligan v. Mulligan*, 18 La. An. 20; *Bank of Penn. v. Grier*, 35 Penn., 11 Cary, 423; *Jones v. Shawhan*, 4 W. & S., Penn., 257.)

IV. It does not follow, because Wermuth sold his interest in the mine to Stuart that the partnership between them to work it, was dissolved. They owned other mines and a furnace together. For aught that appears from the findings they may have continued to work the Hoosac mine in con-

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junction with their other mines, and to smelt the ores at their furnace; or Wermuth may have reserved the right at the time of the sale to continue to work the mine with Strout for a year, or until paid for, or any one of many arrangements may have been made between them for the working of the mine together, notwithstanding the sale of Wermuth's interest to Strout. (*Shelby v. Houston*, 38 Cal. 410; *Smith v. Penny*, 44 Id. 161; *Figg v. Mayo*, 39 Id. 262; *Lovell v. Frost*, 44 Id. 471; *Hixon v. Brodie*, 45 Id. 275; *Servanti v. Lusk*, 43 Id. 238; *Smith v. Cushing*, 41 Id. 97; *Carpenter v. Small*, 35 Id. 346; *Clark v. Willett*, 35 Id. 534; *Steinback v. Krone*, 36 Id. 303; *Lick v. Diaz*, 37 Id. 437; *King v. Wellman*, 38 Id. 595; *City of Oakland v. Whiffle*, 39 Id. 112; *Kusel v. Sharkey*, 46 Id. 3; *Tubbs v. Ghirardelli*, 45 Id. 231.)

If Wermuth alone had originally contracted with Stuart, and had subsequently sold to Strout, Stuart would still have been entitled to his lien. (Phillips on Mech Liens, 326-27, secs. 226-7; *Van Court v. Bushnell*, 21 Ill. 624; *Roach v. Chapin*, 27 Ill. 196; *Amer. F. Ins. Co. v. Pringle*, 2 S. & Rawle, 138; *Keller v. Denmead*, 68 Penn. 449; *Edwards v. Derrickson*, 4 Dutch, N. J., 45; *Vandyne v. Vanness*, 1 Halst. Chan. R. N. J. 485; *Dunklee v. Crane*, 103 Mass. 470; *Mears v. Dickinson*, 2 Phila. 19.)

V. The contract between Stuart and Strout was not one that by the terms thereof was to be performed within one year from the making thereof. It was a contract in fact for no specified length of time, just such a contract as is usually made by mine-owners and their employees—one under which the employee may quit when he pleases, and the mine-owner may discharge his employee when he pleases, and such contracts are always held valid. (*Roberts v. Rockbottom Co.*, 7 Metc. 46; *Kent v. Kent*, 18 Pick. 569; *Fenton v. Embers*, 3 Burr. 278; *Wells v. Hostin*, 4 Bing. 40; *Lyon v. King*, 11 Met. 411; *Foster v. O'Brien*, 18 Mo. 88.)

VI. As between Strout and Wermuth and Stuart, Strout and Wermuth failing to make any application of the payments made by them to Stuart at the time the payments were made, Stuart afterwards had the right to apply all pay-

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ments to the account of board. (*Haynes v. White*, 14 Cal. 446.) There is no distinction to be made between the rights of debtors in this respect and the rights of other creditors. (*Stewart v. MQuaide*, 48 Penn. 195; *Waterman v. Younger*, 49 Mo. 413; *Haynes v. White*, 14 Cal. 446.)

By the Court, BEATTY, J.:

This is a suit to foreclose a mortgage given by Strout and Vermuth to the plaintiff. Robert Stuart was made a party defendant, and in his answer claimed a preferred lien upon the mortgaged premises under the provisions of the laws securing liens to mechanics, miners and others. The district court, in its decree, has allowed his claim, and the plaintiff appeals from the judgment upon the ground that the findings of fact do not support that part of the decree which gives priority to the miner's lien. The substance of that portion of the findings affecting the points to be here decided is as follows: Plaintiff's mortgage was recorded February 25, 1874. Stuart had commenced work on the mine June 24, 1873, as foreman, under a verbal contract with Strout and Vermuth, the mortgagors. No time was agreed upon that his work should continue. He was to receive eight dollars per day, payable monthly. His duties were to act as general foreman, to "boss" the men who were at work in the mine, keep their time, and give them orders for their pay at the end of each month. He continued in this employment without any further contract until May 21, 1875. He filed notice of his lien June 3, 1875. During his employment as foreman of the mine, he also boarded men for his employers, and received money from them, not exceeding the amount due him on board account. No application of the sums so paid was made by either party, at the time, to any particular account, but when respondent filed his notice of lien, he appropriated the amount he had received to the board account. Upon these facts the court concluded that the respondent was entitled to a preferred lien for his wages up to March 2, 1875, amounting to \$4080, and the decree directs that sum to be paid to him out of the net proceeds of the sale of the mort-

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gaged premises, before anything is paid to Capron, the mortgagee.

The first objection of the appellant to this judgment is that the respondent's right to a lien for work done prior to March 2, 1875, was destroyed by the repeal on that day of the law by which it had been secured. But we think this point has been settled adversely to the claim of appellant by the decision of this court in the case of *Skyrme v. Occidental M. & M. Co.* (8 Nev. 219). In this case as in that, the repealing act contains all the provisions of the act repealed, which are necessary to support respondent's right to a lien, and it must be held, both on principle and authority, that the legislature never intended, by the repeal of the old law, to destroy existing rights. (C. L., sec. 126-140, and Stat. 1875, 122.) The only effect of the new law, so far as this case is concerned, was to give Capron's mortgage priority to any lien for work done after its passage, and that effect is allowed to it in the conclusions and decree of the court.

The next point of the appellant is, that Stuart's employment was not of that kind that is protected by the lien law. It is said that he performed no work or labor in or upon the mine, and it is argued that the intention of the law was to secure those only who perform labor upon the mine with their hands; that to give it a wider construction, one that will make it include the wages of a foreman like Stuart, will make it cover the case of a general superintendent and other officers of a corporation, and thereby impair the remedy of those who are the special objects of the legislative care. We do not admit that no distinction could be made in this respect between a foreman of miners and the superintendent of a company, but whether there could or not, we have no doubt that respondent's claim comes within the spirit as well as the letter of the law. According to the findings, he certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction.

Appellant next contends that the respondent had no right as against him, to appropriate the money received from Strout exclusively to the board account, and that the court should make the appropriation to the oldest claims; that is, that it should be appropriated in part, at least, to the labor account. No reason is given, and no authority is cited to sustain this proposition, and we think it cannot be sustained. Clearly, Strout and Stuart had the right to make appropriations without consulting Capron, and if Strout has no objection to the appropriation which Stuart has made, it is difficult to see upon what ground Capron can object.

The appellant complains that the findings and decree give the respondent a preferred lien for certain sums claimed by him under an agreement with Strout that his wages as foreman should continue during a period of thirty days that he was absent from the mine, and that his wages should be doubled for a period of four months if he had to file notice of lien or commence suit. It is unnecessary to express an opinion as to the right of a miner to a lien on the mine for wages not earned by labor on the mine, or for the amount of a penalty agreed upon in case of failure of prompt payment. It is sufficient to say that, in this case, the claims referred to do not appear to have been allowed as against Capron.

These points disposed of, we are brought to the most serious and important question involved in the determination of this appeal.

The appellant takes the ground that the contract under which Stuart commenced work did not cover all the time for which his wages are made a preferred lien, and, consequently, that he has been allowed a preferred lien for work done on a contract or contracts made after notice of the mortgage. And he contends that, although the work done by Stuart may have been continuous, if any of it was done on a contract made after notice of his mortgage, that, as to such work, his lien cannot be preferred.

We think that both of these positions are correct. The original contract was for a month's service at most, and was renewed from month to month by the acts of the parties. In England it has long been settled that a general hiring of

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a domestic servant, without any specification of time, is a contract for a year's service, terminable on a month's notice from either party, and this rule of construction is founded upon the usage of the country. As to other classes of employees, however, there is no invariable rule, though a hiring for a year will be presumed in the absence of any special circumstance tending to prove that the contract was for a shorter term, but very slight circumstances will rebut the presumption. (See authorities collected in notes to 2 Chitty on Cont., 11 American Ed. pp. 840 *et seq.*) In this country the English rule does not prevail even in regard to the hiring of domestic servants, and as to miners or other laborers employed at so much *per diem*, payable monthly, there is no authority for holding that either employer or employee contracts for more than a month's service. Either party may terminate the employment at the end of the month without notice and without incurring any liability to the other. But if the miner continues to work, nothing being said on either side, the law implies a renewal of the original contract, whatever it was, whether for a day, or a week, or a month.

Counsel for respondent argues, that the finding of the district court that Stuart continued to work "without any further contract" is conclusive that his original contract covered all the work he did. But this position is clearly not maintainable. The finding referred to is one of fact, not a legal conclusion, and only means that Stuart continued to work without any express renewal or change of his contract. The legal conclusion which follows from this fact is, that the contract was renewed from month to month by tacit agreement, evidenced by the acts of the parties, this implication being founded upon the same considerations upon which a tenant who holds over is deemed to hold on the terms of the original demise. The truth, then, was, that every month Stuart worked, he worked under a new contract, not express, but implied.

There is a further reason why the original contract made on the twenty-fourth of June, 1873, cannot possibly be held to cover any work done after June 24, 1874. If it had ex-

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pressly provided for more than a year's service, not being in writing, it would have been void (C. L. sec. 289), and the law will not imply a contract which would be void if express. This consideration, however, is not the ground of our decision. It goes upon the ground that Stuart's employment was only from month to month. Capron's mortgage was recorded February 25, 1874, and all the work done by Stuart after the expiration of his then current month was done under contracts made by him after legal notice of Capron's rights, and his lien for such work is subordinate to Capron's mortgage. This construction of the lien law is obviously just and necessary. The language of the statute is: "And all liens herein provided for shall be preferred to every other lien or incumbrance which shall attach upon any property subsequent to the time when the work or labor was commenced," etc.

The question of construction is: What is the meaning of the words, "the work or labor?" What work is meant? Does the statute mean any work that may be done provided it be continuous from a date prior to notice of the mortgage, though partly under contracts made after notice of the mortgage? Or does it mean the work already contracted for before notice of the mortgage? We think the whole spirit of the act requires that its meaning should be limited to the latter sense. And if this construction did not necessarily follow from the language of the act, we should feel bound nevertheless to give it that construction for the reason that this provision of our law is an almost literal copy of a corresponding provision of the California act of April 19, 1856, from which our law is borrowed, and that provision of the California law had been construed before its adoption in this state in the sense here attributed to it. (See *Soule v. Dawes*, 14 Cal. 249; 7 Id. 575.)

It does not follow, however, from these views, as contended by the appellant, that Stuart is not entitled to a preferred lien for the work performed under contracts made prior to notice of his mortgage, for the reason that he did not file notice of his lien within sixty days after the comple-

Points decided.

tion of those contracts. It was settled in the case of *Skyrme v. Occidental M. & M. Co.*, above cited, and we think correctly settled, that when the work is continuous, though done under different contracts, the lien is preserved by giving notice within sixty days after the work is ended.

The judgment appealed from is reversed, and the cause remanded with the directions to the district court to modify the decree in accordance with the views herein expressed, and with costs to the appellant.

[No. 789.]

THE STATE OF NEVADA, RESPONDENT, v. PETER LARKIN, APPELLANT.

REPORTERS' NOTES—MINUTES OF THE TRIAL.—The legislature, in using the words "minutes of the trial," in section 450 of the criminal practice act (1 Comp. L. 2075), meant only the minutes as kept by the clerk, and recorded in the minute book containing the proceedings of the trial, that are daily read by the clerk and approved by the court.

BILL OF EXCEPTIONS—REVIEW OF EVIDENCE.—There is no provision of the statute that will authorize this court to review or examine the evidence in a criminal case, unless it is embodied in a bill of exceptions.

IDEM—REPORTERS' NOTES.—The reporters' notes of the proceedings of a trial can only be considered when adopted by the court as correct, and included in a bill of exceptions, settled and signed by the judge.

INDICTMENT FOR MURDER.—*Held*, sufficient.

CHALLENGE TO GRAND JURORS—RIGHTS OF DEFENDANT.—The defendant was indicted at the October term, 1875. The grand jury for the January term, 1876, was impaneled February 2, 1876. The indictment found at the October term was dismissed February 21, 1876. On the first day of March, the grand jury found another indictment. The defendant during the whole of this time was confined in the county jail. *Held*, that at the time the grand jury was impaneled (February 2, 1876) defendant was not held to answer before it for any offense.

IDEM—REFUSAL OF DEFENDANT TO EXERCISE CHALLENGE.—Where the defendant had the privilege after the indictment was found, under the ruling of the court as well as by virtue of the provisions of section 276 of the criminal practice act, to move to set aside the indictment on any ground which would have been good ground of challenge either to the panel, or any individual grand juror, and refused to exercise the privilege: *Held*, that he is not in a position to complain of the ruling of the court in refusing to set aside the indictment.

ALLOWANCE OF CHALLENGE TO JURORS, NOT SUBJECT TO REVIEW.—Where the prosecution challenges a juror for implied bias in entertaining such con-

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12 123
12 306
12 406
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15 79
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17 279
30* 892
18 461
5* 135
19 369
12* 113
20 395
22* 756

11 314
22 296

Points decided.

scientious opinions as would preclude his finding defendant guilty of murder in the first degree, and the court allows the challenge: *Held*, that under the provisions of section 421 of the criminal practice act, (1 Comp. L. 2046) the allowing of challenges by the court for implied bias is not subject to review.

COURT AUTHORIZED TO DISCHARGE JUROR.—The court may, without a challenge from either party, upon good cause shown, discharge a juror at any time before he is sworn.

IDEM.—The sworn statement of a juror is *prima facie* sufficient to authorize the court to act.

IDEM.—Before the defendant can ask for a reversal upon this ground, he must show that he has in some manner been prejudiced by the action of the court.

IDEM—IMPARTIAL JURY.—So long as an impartial jury is obtained neither party has the right to complain of the action of the court in discharging a juror not challenged by either party.

MOTIVE FOR COMMISSION OF CRIME.—The prosecution has the right to offer any evidence tending to prove a motive for the commission of the crime.

CROSS-EXAMINATION OF A WITNESS.—Every defendant in a criminal case is entitled to a full and perfect cross-examination of every witness who testifies against him.

IDEM.—Where a witness for the prosecution had testified before a coroner's jury tending to exculpate the defendant, and on the trial testified to a different state of facts and upon cross-examination refused to answer some of the questions asked by counsel as to what she had sworn to before the coroner's jury, giving as an excuse for not answering, that she was so intoxicated at that time that she did not know what she testified to: *Held*, that such refusal to answer did not authorize the court to strike out her testimony.

IDEM—REMARKS OF THE COURT.—The court in refusing to strike out the testimony said in the presence of the jury: "I think the witness has answered all the questions, with the exception of some few matters as to her impeachment, and so far as that is concerned, I will relax the rule whenever it is desired to impeach her:" *Held*, that these remarks did not tend to prejudice the defendant.

CRIMINATING CIRCUMSTANCE—WEAPONS BELONGING TO DEFENDANT.—Where the pistol, with which the crime was committed, belonged to defendant, and was found in defendant's bed-room shortly after the homicide: *Held*, that these facts tended to establish one link in the chain of circumstantial evidence, and the court was not authorized to withdraw its consideration from the jury.

IDEM.—The fact that other parties had access to defendant's bed-room might have the tendency to weaken the force of this link in the chain of evidence, but it would not, of itself, destroy it.

CREDIBILITY OF WITNESS—WANT OF CHASTITY.—Defendant asked the court to give this instruction: "The jury may, and it is their duty, to take into consideration the chastity or want of chastity of any witness for the state, in determining the credibility of such witness:" *Held*, that it was calculated to mislead the jury, and was properly refused.

Statement of Facts.

IDEM.—The general rule is that evidence of bad character for chastity, where such character is collaterally, not directly, in issue, is not admissible for the purpose of impeaching the credibility of a witness.

IDEM.—Want of chastity might in some instances include a want of veracity, but this is not always the case. In impeaching the character of a witness the inquiry in chief should be restricted to his general reputation for truth and veracity.

EXCITEMENT AND PREJUDICE OF BYSTANDERS.—The defendant claimed that his case was prejudiced by the action of the bystanders, during the argument of the district attorney, by clapping their hands, stamping the floor and benches, etc., etc. The affidavits produced by the state show that the spectators but once evinced a desire to applaud the district attorney, and the court immediately suppressed the manifestation: *Held*, that defendant's case was not improperly prejudiced, and that the court did not err in refusing a new trial.

APPEAL from the District Court of the First Judicial District, Storey County.

The indictment, after the caption and heading, reads as follows:

“Peter Larkin is accused by the grand jury of the county of Storey, by this indictment, of the crime of murder, committed as follows, to wit: that on or about the fourth day of August, A.D. 1875, and before the finding of this indictment, at the county of Storey and state of Nevada, he, the said Peter Larkin, with force of arms, in and upon the body of one Daniel Corcoran, in the peace of said state, then and there being, willfully, feloniously, and without authority of law, and of his malice aforethought, did make an assault, and that the said Peter Larkin a certain pistol then and there charged with gunpowder and leaden bullets and capped, and then and there said pistol being a deadly weapon, which said pistol he, the said Peter Larkin, then and there had and held, then and there feloniously, without authority of law, and of his malice aforethought, did discharge and shoot off to, against, and upon the body of the said Daniel Corcoran, thereby giving to him, the said Daniel Corcoran, then and there, as aforesaid, a mortal wound, of which said mortal wound he, the said Daniel Corcoran, afterwards, to wit: on the fifth day of August, A.D. 1875, died at the county aforesaid. And so the jurors aforesaid, upon their oaths, do say, that the said Peter

Argument for Appellant.

Larkin, him, the said Daniel Corcoran, in the manner and by the means aforesaid, feloniously, without authority of law, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said state of Nevada." (Signed by the district attorney of Storey county.)

To this indictment the defendant interposed a demurrer, alleging the following grounds:

I. That it does not substantially conform to sections 234 and 235 of the criminal practice act in this, to wit: first, the indictment does not contain a statement of the acts constituting the alleged offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Second, the time of the commission of the alleged offense is not stated with sufficient certainty. Third, it does not appear that the said Corcoran ever died from any act of the defendant, or if dead, that he died within a year and a day from the time of the infliction of the said wound. Fourth, the indictment does not follow the form as laid down by the statute.

II. That more than one offense is charged in the indictment.

III. That the facts stated in the said indictment do not constitute a public offense.

The demurrer was overruled by the court.

The other facts are sufficiently stated in the opinion.

Louis Branson, for Appellant.

I. The court erred in not sustaining the demurrer to the indictment.

II. It erred in not allowing the defendant to challenge the grand jury. It is the practice to allow challenges; the law provides for it, and why not allow it? It is a right secured to any defendant who is in custody on any charge. In the case at bar the defendant was not presumed to know when the grand jury met, and, in fact, did not know when it met, and could not have asserted his right if he had wanted to do so ever so much; and, therefore, the rule laid down in

Argument for Appellant.

People v. Romero (18 Cal. 93), is not applicable in this case. Besides, the doctrine of that case is not sound law, and cannot be, under any circumstances. To require the defendant in case of felony to take notice, at his peril, of any law or of any action had in court with his case, when he is locked up in an iron prison and not allowed to see any one but his counsel, is bad law in any country and under any system, and there is no reason for the rule.

III. The challenges interposed by the prosecution to the jurors should have been overruled. The gist of the cause of challenge, under the ninth subdivision of section 340, criminal practice act, is conscientious scruples as to capital punishment; and the record shows that such scruples did not exist in the case of the jurors Klein, Taylor, and Randolph. (1 Arch. Cr. L. 553; *Commonwealth v. Webster*, 5 Cush. 295; *People v. Stewart*, 7 Cal. 140.)

IV. The court erred in excusing the juror Wilson, neither party challenging him. This action of the court was had on the bare statement of the juror that he was not a citizen of the United States, without there being one single fact before the court to determine that question, which is a mixed question of law and fact.

V. The court erred in allowing the state to prove adultery between the witness Nellie Sayres and the prisoner. It was unnecessary to do this in order to show motive. The ill feeling existing between them could have been shown by other evidence competent to show malice without proving adultery, which had a tendency to prejudice the minds of the jury against him unnecessarily.

VI. The court erred in refusing to strike out the whole of the evidence of the witness Nellie Sayers. Where a witness refuses to answer all the questions on the cross-examination, and the court has no power to compel her, and does not compel her to do so, the only remedy the party has is to strike out the whole of the evidence and withdraw it from the jury. In making the ruling on the motion to strike out, the court makes a statement in the presence of the jury it had no right to make, and which had a tendency to damage the defendant's right.

Argument for Respondent.

VII. The court erred in refusing the fifth instruction asked by the prisoner. If other persons had possession of the pistol about the time of the shooting, and might have had equal access to and use of the same, and if other persons had access to the prisoner's bedroom after the shooting occurred, then no inference of guilt could be drawn from the fact that the prisoner owned the pistol, or that it was found in his bedroom.

VIII. The court erred in refusing the fifteenth instruction asked by the prisoner. If the rule that want of chastity is good ground of impeaching the credibility of any female witness in any case, it is time it should be so settled in this court. No man's life should be forfeited on such evidence.

IX. The court erred in refusing to grant a new trial on account of the part the bystanders or crowd took in the proceedings. At best, the prisoner was tried by a jury exceedingly prejudiced, and this action of the populace gives the trial more the character of that of a mob than that of a judicial trial. It is the settled belief of the prisoner that the prejudice of the jury and the action of the populace had more to do in influencing the verdict of the jury than all the evidence in the case.

J. R. Kittrell, Attorney-General, and Dickson & Lindsay,
for Respondent.

I. The indictment is in all respects complete, and fully complies with the requirements of sections 234 and 235 of the criminal practice act. (*People v. Dolan*, 9 Cal. 576; *State v. Anderson*, 4 Nev. 265.)

II. A challenge to the panel or individual grand juror is a personal privilege, and one which the defendant in a criminal case may exercise or waive at his option. (*People v. Beatty*, 14 Cal. 566; 15 Id. 329.)

Assuming it to be true that appellant had not been held to answer before the finding of the indictment, his neglect to move to set aside the indictment, as permitted by section 276 of the criminal practice act, precludes him from afterwards taking the objections mentioned in sections 275 and 276 of said act. (*Vide* Crim. Pr. Act, sec. 277.)

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The privilege to challenge the panel of the grand jury must be asked for by the accused, and the court need not offer him his privilege of challenge unless he first demand it. (*People v. Romero*, 18 Cal. 89.)

III. The rulings of the court in allowing the challenges interposed by the district attorney to the jurors, Kline, Taylor, and Randolph, were correct. (Crim. Pr. Act, sec. 340; *State v. Salge*, 1 Nev. 455.)

IV. The questions asked of the witness, Nellie Sayers, by the district attorney, were proper. The object in asking them was to show a motive on the part of the defendant for the commission of the homicide. (Roscoe's Crim. Ev., p. 88, and authorities cited in the text and note; 1 Whar. C. L., sec. 635; Wills' Cir. Ev., 57-8; *Johnston v. State*, 17 Ala. 618; *State v. Rash*, 12 Ire. 382; 9 Conn. 46.)

V. Defendant's motion to strike out the testimony of the witness, Nellie Sayers, was properly overruled. It should have been submitted to the jury unless the witness had been successfully impeached. The offer of the court below to relax the rule and permit defendant's counsel to introduce evidence in defense to contradict the witness, just the same as if she had answered counsel's question directly, was going as far as defendant had a right to ask, and was indeed altogether favorable to defendant.

VI. The court should have refused to give instruction, because there is no evidence contained in the record to make it pertinent. (*People v. Sanchez*, 24 Cal. 17.)

VII. We know of no rule of law which excludes evidence emanating from an unchaste woman; though a female may lack this great moral quality, still it does not follow that because of such deficiency she is not to be believed on oath.

By the Court, HAWLEY, C. J.:

The defendant, Peter Larkin, was convicted of murder in the first degree. He appeals from the judgment and from the order of the court overruling his motion for a new trial; also from the order of the court overruling his motion in arrest of judgment. Upon the day set for hearing the argu-

ment on appeal, he moved this court for a writ of mandamus to compel the clerk of the district court to certify to this court the "minutes of the trial," as kept by the reporter of the district court. The minutes of the court show that on the first day of the trial of this cause, the court appoints Charles F. Reynolds, Esq., reporter, to report the proceedings of this trial, and he is duly sworn according to law as such reporter."

Section 450 of the criminal practice act provides that the record of the action shall consist, among other things, of "A copy of the minutes of the trial." (1 Comp. Laws, 2075.)

It is claimed that the minutes kept by the reporter are the only minutes of the trial, and that in pursuance of the above section it was the duty of the clerk to include the same in "the record of the action."

The application for mandamus was denied, for the reason that in our judgment the legislature, in using the words "minutes of the trial," meant only the minutes as kept by the clerk, and recorded in the minute book containing the proceedings of trial that are daily read by the clerk and approved by the court. As to the correctness of this ruling there ought not to be any doubt or controversy, and if it was not for the fact that in *Gregory v. Frothingham* (1 Nev. 260), this question is referred to, in a dictum of the court, as being one upon which the court was divided in opinion, we should not be disposed to discuss it.

If, by the mere act of appointing a reporter to report the proceedings, the court adopts the notes kept by him as the minutes of the trial, as was argued by counsel, then we would have a record without any verification, save, perhaps, the certificate of the reporter. The court would have no power, after the notes were completed and filed, to correct or in any manner change the same. It would be the duty of the clerk to copy them in making up the record of the action after conviction, and without further verification they would be included in the transcript on appeal.

If the reporter kept notes of all the points raised by counsel and the rulings of the court thereon, as well as the testimony of the witnesses, as appears to have been done in

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this case, then it would, if appellant's position is correct, be unnecessary to have any bill of exceptions, and the whole record would depend for its authenticity upon the reporter. The reporter would in fact be made superior to the district judge.

Such a practice would not only jeopardize the rights of every defendant in a criminal case, but it would lead to endless confusion and distrust, and would entirely destroy the certainty of legal records and defeat the very object for which they are made and kept.

If the statute warranted such a proceeding, it would be our duty to follow it; but it is evident that when the various sections of the criminal practice act are examined, it was the intention of the legislature to avoid, instead of to encourage or countenance such a loose, unsatisfactory and dangerous practice.

In *The State v. Huff, ante*, it is clearly intimated that the correct practice, if counsel desire to have the reporter's notes included in the record on appeal, is to insert them in the bill of exceptions, so that they can be identified and authenticated as the statute provides.

There is no provision of the statute that will authorize this court to review or examine the testimony, in a criminal case, unless it is embodied in a bill of exceptions. It is simply absurd to contend that the legislature meant to include the reporter's notes of the testimony as the "minutes of the trial."

Section 423 provides that: "A bill containing the exceptions must be settled and signed by the judge." (1 Comp. L., 2048.)

Section 424 provides that: "The bill of exceptions shall contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken, and the judge shall, upon the settlement of the bill, whether agreed to by the parties or not, strike out evidence and other matters not material to the questions to be raised." (1 Comp. L., 2049.)

It is the duty of the district judge to examine the evidence in the bill of exceptions and to certify to its correct-

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ness. In no other way can the evidence be authenticated so as to authorize this court to consider it. There is no law in this state authorizing the appointment of official reporters, nor any provision that requires a reporter when appointed to certify to the correctness of his notes; nor is there any provision that makes it the duty of the clerk to certify to the same. They can only be considered when adopted by the court as correct and included in a bill of exceptions settled and signed by the judge.

In California there is a law authorizing the appointment of official reporters, and it provides that his notes "shall always be taken as *prima facie* evidence of the testimony given upon any trial where such notes are taken," and the supreme court, in the *People v. Woods*, refused to consider the reporter's notes because they were not properly authenticated. Wallace, J., in delivering the opinion of the court, said: "In the record before us no statement of the evidence is contained in an authentic form. It is true, that the notes of evidence taken by the phonographic reporter are embodied in the transcript, and the certificate of the reporter is appended to the effect that they constitute a correct statement of the evidence, to the best of his knowledge and belief. But the act of 1867-8, 425, provides that the reporter's notes shall be taken as *prima facie* evidence only; that is, of course, that wherever presented they are open to question, and, possible, correction. This provision evidently refers to the proceedings to be had in the court below upon settlement of statements, allowance of bills of exceptions, etc. The record filed in this court, and upon which we proceed here, however, are not merely *prima facie*, but are conclusive in their character, and we have no means of correcting the notes of the reporter of the court below, or of entertaining an inquiry into their conformity with the facts actually occurring in that court. It results that the reporter's notes cannot be considered in this court." (43 Cal. 177.)

We shall now proceed to consider the various objections that were taken in the court below, and properly included in the record on appeal.

1. The indictment is in proper form. The objections thereto were virtually abandoned on the oral argument, and need no further notice.

2. The defendant moved the court to set aside the indictment on the ground that he was in custody of the sheriff, and confined in the county jail "under and by virtue of an order of the court to answer the charge of murder," and that he was not allowed the privilege of challenging the panel, or individual members of the grand jury. The facts as set forth in the bill of exceptions are as follows:

"The grand jury for the January term, 1876, of said court, was impaneled by the said court on the second day of February, A.D. 1876; that at the time of the impanelment of the said grand jury, the said defendant was not held to answer before the said grand jury for any offense whatever, but that in truth and in fact, an indictment had prior to the impanelment of said grand jury been found against said defendant for murder, by the grand jury of the October term, 1875, of said court, which said indictment was still pending against said defendant at the time of the impanelment of the said grand jury impaneled by the said court for the said January term, 1876, of the court; which said indictment was afterwards, to wit, on the twenty-first day of February, 1876, dismissed upon proper proof of the destruction thereof by fire. * * * That neither the said defendant, nor his counsel, nor any person in his behalf, has ever at any time asked, or demanded of this court the privilege of appearing before the said grand jury so impaneled as aforesaid, nor for an opportunity to challenge the panel or any individual member of the said grand jury; * * or * * ever at any time heretofore made any showing that the said defendant had in fact any ground of challenge to the panel of said grand jury, or to any individual member thereof; that at no time has this court ever refused such right, or privilege, to the said defendant, or any person in his behalf. The court, after duly considering the said motion, the facts and the premises, stated to the defendant and his counsel, that they could move to set aside the said indictment by taking any objection thereto that might have

been taken advantage of to the said grand jury or any member thereof, had the defendant appeared before said grand jury. No desire being so expressed either by said defendant, or his counsel, the court overruled said motion, and required the said defendant to plead to said indictment."

From these facts it appears that at the time the grand jury was impaneled defendant was not held to answer before it for any offense. He however had the privilege, under the ruling of the court, as well as by virtue of the provisions of section 276 of the criminal practice act, to move to set aside the indictment "on any ground which would have been good ground of challenge either to the panel or any individual grand juror." (1 Comp. L. 1900.) Having refused to exercise this privilege he is not in a position to complain of the ruling of the court. (*People v. Romero*, 18 Cal. 93.)

3. It is claimed that the court erred in allowing the challenge of the prosecution to the jurors, Klein, Taylor and Randolph, for implied bias in entertaining such conscientious opinions as would preclude their finding defendant guilty of murder in the first degree. Whether the answers given by these jurors were of such a nature as to actually disqualify them from serving as jurors, is a question that is not, under the provisions of our statute, subject to review. Section 421 of the criminal practice act provides that "exceptions may be taken by the defendant to a decision of the court upon a matter of law, * * * in disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias." (1 Comp. L. 2046.) The action of the court in *allowing* challenges for implied bias is not made the subject of an exception, and the reason why it was omitted as one of the grounds of an exception is correctly stated by the supreme court of California in *The People v. Murphy*, as follows: "The reason, and it is a sensible one, upon which the statute proceeds, is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn in the case, the purpose of the law in that respect has been accomplished, that, though in the impaneling of the jury one competent person be rejected,

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yet if another competent person has been substituted in his stead, no injury has been done to the prisoner, certainly no injury which a new trial would repair, because even should a venire *de novo* be awarded, it is not pretended that the prisoner could insist upon the excluded person being specially returned upon the panel. The result would be that the prisoner would probably be tried again by another competent jury of which the excluded person would not be a member, and so the new trial would only be to do over again that which had been done already." (45 Cal. 143.)

4. The defendant interposed an objection to the ruling of the court in excusing the juror Wilson upon the ground that neither party challenged him. The record shows that this juror upon his *voire dire* testified that he was not a citizen of the United States. It is claimed by appellant's counsel that the court acted without there being one single fact before it to determine whether this testimony was true. The sworn statement of the juror was certainly *prima facie* sufficient to authorize the court to act. If the defendant entertained the belief that the juror was a citizen, the proper course for him to have pursued, would have been to propound such questions, or at least to have asked permission to do so, as would have presented the facts of the case to the court. The objection as made is wholly untenable. In the *State v. Kelly*, it was decided that, in cases of this kind, the court in the exercise of its sound discretion has the right of its own motion to discharge a juror at any time before he is sworn. (1 Nev. 227, and authorities there cited.) If there is an abuse of this discretion it might perhaps be subject to review, although there are but few cases reported where the judgment of the court has ever been disturbed upon this ground. The authorities all agree that for any good cause shown the court may, without challenge from either party, excuse a juror before he is sworn. (*People v. Arceo*, 32 Cal. 44; *Lewis v. State*, 9 S. & M. 118; *McGuire v. State*, 37 Miss. 376; *State v. Marshall*, 8 Ala. 304; *Jesse v. State*, 20 Geo. 164; *Pierce v. State*, 13 N. H. 554; *Montague v. Commonwealth*, 10 Grat. 767; *Commonwealth v. Hayden*, 4

Gray, 19; *Stout v. Hyatt*, 13 Kansas, 241; *The Atlas Mining Company v. Johnston*, 23 Mich. 39.)

In *Commonwealth v. Hayden*, before the jury were impaneled, one of the jurors requested to be excused, because he lived in the same town with the defendant. The judge asked the juror whether he had formed or expressed any opinion in regard to the case, or had any interest or bias in relation thereto, and the juror answered he had not. The judge said that the reason assigned by the juror was not of itself a sufficient excuse, but, in the exercise of his discretion, directed the juror to leave the panel, and a supernumerary to take his place, and the supreme court held "that it was within the authority of the court, in its discretion, to excuse the juror for the reason assigned, although he was not legally incompetent to sit in the trial."

In *Stout v. Hyatt*, the court say: "It is not a substantial error for the district court to discharge a juror during the time the jury are being impaneled, although the juror may be discharged for an insufficient reason, where an unexceptionable jury is afterward obtained, and where the party complaining has not exhausted his peremptory challenges." If this right exists where the juror is free from all statutory disqualifications *a fortiori*, there cannot be any question as to the right of the court to act, in a case like the present, where the statute declares that the juror is disqualified. In such a case it is the duty of the district court to excuse the juror. There is no doubt but what a qualified juror may be rejected by the court, and still an impartial jury be obtained. Before the defendant can ask for a reversal upon this ground, he must show, as in other cases, that he has, in some manner, been prejudiced by the action of the court. (*State v. Raymond*, *ante*.) The true rule applicable to criminal as well as civil cases, is, in our judgment, clearly and correctly stated in the case of *The Atlas Mining Company v. Johnston*, as follows: "And though it would be ground of error for the court to admit a juror who is challenged, and ought to have been rejected, it is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required; and that for this

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purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause; or, in other words, when the refusal to sustain the challenge would not constitute error. So long as an impartial jury is obtained, neither party has a right to complain of this course by the court; and especially when, as in this case, no objection was taken by either party to the competency or impartiality of the jury which was obtained."

5. It is claimed that the court erred in allowing testimony as to the intimate and illicit relations existing between the witness Nellie Sayers and the deceased; also, as to the same relations between this witness and the defendant. "An evil motive," says Mr. Wills in his work on Circumstantial Evidence, "constitutes in law as in morals, the essence of guilt; and the existence of an inducing motive for the voluntary acts of a rational agent is assumed as naturally as secondary causes are concluded to exist for material phenomena. The predominant desires of the mind are invariably followed by corresponding volitions and actions. It is therefore indispensable, in the investigation of moral actions, to look at all the surrounding circumstances which connect the supposed actor with other persons and things, and may have influenced his motives." (38.) The prosecution had the right to offer any evidence which tended to prove a motive in defendant for the commission of the crime, and this testimony was clearly admissible for that purpose. (*State v. Watkins*, 9 Conn. 52; *State v. Green*, 35 Conn. 203; *Johnson v. State*, 17 Ala. 625-6; *State v. Rash*, 34 N. C. 382.)

6. The court did not err in refusing to strike out the evidence of the witness Nellie Sayers. It is true, as was argued by counsel for appellant, that the full, free, and complete cross-examination of a witness is one of the unquestionable rights that every defendant and every litigant is entitled to. A thorough cross-examination is perhaps the most efficacious test which the wisdom of the law has ever devised in order to discover the truth. It is not contended, however, that this right was in any manner

abridged, or denied, by the court. In fact the record affirmatively shows that the court used every means within its power to aid and assist the counsel in securing this right. It was claimed that this witness testified before a coroner's jury to an entirely different state of facts from what she testified to at the trial. Her testimony, before the coroner's jury, as was claimed, tended to show that defendant did not commit the crime. Her testimony at the trial tended very strongly to prove that the defendant was the guilty party. Upon cross-examination she refused to answer some of the questions asked by defendant's counsel as to whether she had or had not testified to certain facts before the coroner's jury, giving as an excuse for not answering that she was so intoxicated when before the coroner's jury, that she did not know what she there testified to. She claimed to be perfectly oblivious of everything that transpired before the coroner's jury. At the close of her examination defendant's counsel moved the court to strike out her testimony, because she had refused to answer the questions propounded upon cross-examination. In overruling this motion the court, in the presence of the jury, said: "I think the witness has answered all the questions, with the exception of some few matters as to her impeachment, and so far as that is concerned, I will relax the rule whenever it is desired to impeach her; but I shall refuse to strike out the evidence. If you desire to introduce this matter in defense in contradiction of the witness, I will allow you to introduce it the same as if she had answered directly." The court would certainly have erred had it granted the motion. The witness being competent to testify her credibility was a question solely for the jury to decide. The fact that the court offered to relax the rule and allow the defendant to impeach the witness the same as if the proper foundation had been laid, did not have any tendency to prejudice the rights of the defendant; nor is there anything in the remarks made by the court in overruling defendant's motion that could possibly have had any such tendency. The defendant did not avail himself of the privilege to offer any testimony to directly impeach

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the witness. Her testimony was properly submitted to the jury for what it was worth. (*Jones v. Gammons*, ante.)

7. It is contended that the court erred in refusing to give this instruction: "The jury can draw no inference of guilt from the fact that the pistol in question was and is the property of the prisoner, if other persons had access to and might have had the possession of, or used the said pistol; nor from the fact that the pistol was found in the prisoner's bedroom, if other persons had access to, or might have had access to, the bedroom after the shooting was done." Waiving, for the nonce, the question of the absence from the record of all testimony tending to show the applicability of this instruction, and assuming that there was testimony offered at the trial which would have warranted an instruction upon this point, it is evident that the court did not err in refusing this instruction. The fact that the pistol belonged to defendant and that it was found in defendant's bedroom shortly after the homicide, tended to establish one link in the chain of circumstantial evidence, and the court was not authorized to withdraw its consideration from the jury. The fact that other parties had access to defendant's bedroom might have a tendency to weaken the force of this link in the chain of evidence, but it would not, of itself, destroy it.

8. It is next claimed that the court erred in refusing to give the following instruction, asked by defendant's counsel: "The jury may, and it is their duty to, take into consideration, the chastity, or want of chastity of any witness for the state, in determining the credibility due such witness." This instruction is not confined to any particular witness. It was, as we think, intended to mislead the jury, and was properly refused. It tells the jury, in effect, that want of chastity is sufficient to destroy the credibility of a witness. As a general proposition, to be applied indiscriminately to all cases, this is not true. A witness may be unchaste and yet be truthful. A witness may be chaste and yet be untruthful. The law affords ample remedies for testing the credibility of witnesses, without introducing testimony of specific acts of immorality, and in particular instances allows greater latitude than in others, owing to the special

facts and circumstances that surround each individual case. There are perhaps exceptional cases where it might be proper to show the utter depravity of the moral character of a witness in order to establish the fact that such a witness is not entitled to any credit. But we are not dealing with the exceptions. The general rule, as recognized by a majority of the decided cases, is that evidence of bad character for chastity, where such character is collaterally, not directly in issue, is not admissible for the purpose of impeaching the credibility of a witness. (*People v. Islas*, 27 Cal. 630; *Gilchrist v. McKee*, 4 Watts, 380; *Jackson v. Lewis*, 13 Johns. 505; *Bakeman v. Rose*, 14 Wend. 110; *Ford v. Jones*, 62 Barb. 484; *Spears v. Forrest*, 15 Vt. 435; *Kilburn v. Mullen*, 22 Iowa, 502; *Rudsill v. Slingerland*, 18 Minn. 381.

We decided in the *State v. Huff*, ante, that "no legitimate influence of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries. It could be inferred that he was a violent-tempered, and, perhaps, a dangerous man, but not that he was a liar." The same general principle applies to all cases. A man may be so incontinent as to destroy his reputation for chastity, and yet retain a scrupulous regard for truth. Want of chastity, in many instances, might include a want of veracity; but, it must be admitted, that this is not always so. It is only with the witness's character for truth and veracity with which the jury have to deal. A witness, although unchaste, is entitled to credit if the jury are convinced that his, or her testimony is true. A witness, although chaste, is not entitled to credit if the jury are convinced that his, or her, testimony is false. "The only object in inquiring into the character of a witness," as was said in *Rudsill v. Slingerland*, "is to ascertain whether his statements, in themselves, are entitled to credit; if he is a truthful person, they are; otherwise they are not. A witness, therefore, in coming into court, would, perhaps, properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but we are unable to see why a witness should be held responsible to answer for, or be required to meet an attack upon his

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character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness, and his reputation for truthfulness, may be unimpeachable. An inquiry in such a case as to his moral character would mislead, instead of assist, in arriving at the object of investigation, namely, his credibility; it would, in any event, be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice. For these, among other reasons, we think the better general rule is, that in impeaching the character of a witness in this mode, the inquiry in chief must be restricted to his credibility; that is, his general reputation for truth and veracity. Before passing from this point we deem it proper, in general terms, to state, that upon an examination of the record it will be found that the jury were very fully instructed with reference to their duties in determining the credibility of the witnesses introduced upon the part of the state, and that it is apparent therefrom that defendant has no ground of complaint against the court upon this point. At defendant's request, the jury were instructed that it was their duty to take into consideration the previous statements under oath, or otherwise, in regard to the facts testified to by them, the sobriety, or want of sobriety, any bad will or ill feeling, upon the part of said witnesses in determining their credibility. Another instruction reads as follows: "The jury are the exclusive judges of the credibility of the witnesses, and if the witnesses, any one or all, who testified for the state are of such a character, or if they have been so impeached as to create a reasonable doubt in the minds of the jury as to the guilt of the defendant, they will give that doubt to the prisoner."

9. The last objection is presented by the affidavits made by the defendant and by his counsel. It is alleged in the affidavit made by defendant's counsel that during the closing argument of the district attorney, "the court-room was crowded to its fullest capacity with spectators, both seated

and standing, and, as affiant is informed and believes, the greater portion of the same were fairly intoxicated with excitement and prejudice against the said defendant, and that during the said argument of the said district attorney, the said crowd standing near the said jury, cheered the said district attorney by the clapping of hands and stamping the floor and the benches, similar to the demonstrations usually had at political meetings; that no steps were taken at the time by the court, or any of its officers to punish any of the persons so disturbing and interfering with the proceedings of the said trial, but the said district attorney did very much after the style of Marc Anthony make an appeal to the excited crowd and *begged them* not to cheer him any more." The affidavit of the defendant was substantially to the same effect. Upon the presentation of these affidavits the defendant asked the court to grant him a new trial, and it is claimed the court erred in refusing to do so. The prosecution upon this point presented the affidavits of Robert H. Lindsay, district attorney; Thomas E. Kelley, sheriff; H. C. Thompson, deputy clerk; and Charles F. Reynolds, reporter, each of whom stated that he was present during the whole of the trial of said case, that the whole trial was conducted with the usual and proper dignity and decorum, "that during the closing argument of the district attorney the spectators in the court-room once, and only once, evinced a desire to applaud some of the remarks of the district attorney, when the court immediately and peremptorily suppressed the same, and there was no further manifestation of feeling whatever on the part of the said spectators during any time of the said trial." Without commenting on the language used in the affidavit of counsel for defendant, it must, in this case, suffice for us to say, that the counter-affidavits presented by the prosecution clearly establish sufficient facts to warrant us in coming to the conclusion that nothing transpired during the closing argument of the district attorney that improperly prejudiced defendant's case or prevented him in any manner from having a fair and impartial trial. The court did not err in refusing to grant a

Points decided.

new trial. The judgment and orders appealed from are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

[No. 787.]

THE STATE OF NEVADA, RESPONDENT, v. JOHN W. NELSON, APPELLANT.

INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY.—In an indictment for robbery from a stage-coach, of property belonging to Wells, Fargo & Co., the ownership of the property may be laid in the driver of the coach.

IDEM—The essential averment is that the property did not belong to the defendant.

IDEM—DIFFERENT COUNTS.—Where there are two counts in the indictment, one alleging the property in the driver of the coach, and the other averring that the property belonged to Wells, Fargo & Co.: *Held*, that the district attorney was not bound to make an election and confine himself to one count of the indictment.

IDEM—RIGHT OF DEFENDANT.—*Held*, that inasmuch as the defendant had no right to demand an election between the counts in the indictment in the first place, that he had no right to insist upon a voluntary election made by the district attorney, unless in consequence of reliance upon such election being adhered to, he had done or omitted to do something by which he would have been prejudiced.

INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE—DEGREE OF CERTAINTY.—The court gave this instruction: "If you believe the evidence given in this case, in order to convict, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoners's guilt:" *Held*, correct.

REASONABLE DOUBT.—ENTIRE SATISFACTION.—The court in instructing the jury in regard to reasonable doubt, uses the following language: "And if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be *entirely satisfied* that the defendant and no other person committed the alleged offense:" *Held*, not erroneous.

IDEM.—If a man believes that a defendant may possibly be innocent, he cannot be said to be "entirely satisfied" of his guilt, and yet he may be satisfied of it beyond a reasonable doubt, and may convict.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

Argument for Appellant.

The fifth instruction asked by the defendant and refused by the court—referred to in the opinion—reads as follows: "If the jury find from the evidence in this case that the property alleged to have been taken was being conveyed by the proprietors of the stage line for an express company, under a contract with such express company, and that the said G. N. Brown, who is alleged in the indictment as being the owner of said property, was only the driver of the stage in which said property was being conveyed, was only the hired man, servant and employee of the proprietors of such stage line, hired and employed by them for that specific purpose only, then I charge you that the said G. N. Brown had no such title to, or possession of the property alleged to have been taken which will sustain a conviction upon the indictment in this case, and you will find the defendant 'not guilty,' as charged in the indictment, unless you further find from the evidence that the said G. N. Brown was the absolute owner of the property."

J. L. Wines, for Appellant.

I. What kind of ownership must the party, alleged to be the owner, have in the property, the subject of the robbery, in order to support the indictment; or, in other words, to avoid the effect of a variance between the indictment and the proof? It may safely be assumed that the ownership of the property must be alleged in the same manner in an indictment for robbery that it must in larceny. At least, the indictment must in some way negative property in the defendant, and if the pleader chooses to specially aver ownership in a certain individual, he must prove this ownership as alleged. (2 Bish. Crim. Prac., sec. 1007; 2 Halstead Law of Ev., 280; *People v. Vice*, 21 Cal. 344; *Hogg v. State*, 3 Bl'kfd. 326.)

That ownership may be alleged to be in one not the absolute owner, we do not question; but such person, we claim, must belong to that class of owners known as special owners, such as have a special or qualified property in the property, such, for instance, as "innkeepers," "common carriers," "agisters," "livery men," mechanics employed

Argument for Appellant.

to manufacture or repair an article, persons who have a lien upon the property for their claim, and who have such a property in, and possession of, the article, that it cannot be taken from them until the conditions upon which they became possessed of it have been performed.

Can it be said that Brown, in this case, had any such ownership or possession of the property? He was neither employed by the owners of the property or by the express company. He was a mere servant of the stage company, and had nothing but a bare charge or custody of the property, but no ownership whatever; knew nothing of the contents of the express box; carried no key to the box; received the box from the express agent in the morning, and delivered it to the agent in the evening. Defendant's fifth instruction ought to have been given. (*People v. Bennett*, 37 N. Y. 117; *Commonwealth v. Morse*, 14 Mass. 216.) The proprietors of the stage line were in the actual possession of the property through their servant, G. N. Brown, for it is well settled that the possession of the servant is the possession of the master. (*Brownell v. Manchester*, 1 Pick. 232-234; *Lauden v. Leavitt*, 9 Mass. 104; Story on Bailments, 5th ed., secs. 93a, 93b; 1 Denio, 123, and cases cited.)

II. The court committed an error in giving instructions Nos. 5 and 9 asked for by the state. The jury were told, and to which we do not object, that circumstantial evidence was of a nature identically the same with direct evidence; but they were again told, in instruction No. 5, that the circumstances should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony. In other words, the court instructed the jury that they would be justified in convicting the defendant where the evidence was circumstantial, although there might be more doubt in their minds than if the evidence was direct. We understand the test to be: "Is there a reasonable doubt?" but in this case the court declared and erected some other standard by which the jury should be governed.

We think such an instruction dangerous and liable to mislead the jury. The term "reasonable doubt" can be easily arrived at by a jury; but in using the word "nearly," as it

Argument for Respondent.

was used in this instruction, opens up a very wide range of thought for a juror.

We also desire to call the attention of the court to instruction No. 7, where the jury was informed by the court that they were justified in finding the defendant guilty, although they might not be *entirely satisfied* that he and not some other person committed the offense. It is true the instruction is copied from one approved of by the supreme court of California in 34 Cal.; yet if the question is an open one in this state, we submit that it is a dangerous innovation upon the rule of "reasonable doubt." It is the coining of a new phrase upon this question, likely to embarrass jurors, prejudice the rights of defendants, and lead to the unsettling of a long line of decisions heretofore recognized as binding. (1 Bish. Crim. Pro., sec. 1052; *People v. Phipps*, 39 Cal. 326, and opinion of Crockett, J., on p. 334; *People v. Padilla*, 42 Cal. 535-40.)

J. R. Kittrell, Attorney-General, for Respondent.

I. In larceny, it is everywhere decided that the ownership of stolen property may be laid in either the bailor or the bailee, that it may be laid in him who has either a general or special property in the articles stolen. (2 Bish. Crim. Pr., sec. 682; 2 Hale's P. C., 181; 1 Id. 513; *People v. Bennett*, 37 N. Y. 117; *Poole v. Symonds*, 1 N. H. 289; *Rex v. Deakin & Son O. B.*, 2 East. P. C. 653.)

The test of ownership in such cases as the one at bar appears to be this: that if the party from whose possession the goods were taken had such property in them, at the time of their abstraction, as would enable him to maintain an action of trespass, replevin or trover against the party taking the goods, then it is proper for the ownership to be laid in him in whose favor such action would lie. (*Poole v. Symonds, supra*; 2 Russ. on Crimes, 86; 2 Bish. Cr. Pr., sec. 683.)

Proof that the person alleged to be the owner had a special property, or that he had it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support the allegation in

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the indictment. (*State v. Sommerville*, 21 Me., and cases cited.)

It is contended by appellant's counsel, in his written argument, that the court below erred in giving to the jury instructions five and seven. It will be perceived by comparing these instructions with those given in the case of the *People v. Cronin* (34 Cal. 191), that they are identical, and that Sanderson, J., in a well-considered opinion, upholds them as a true exposition of the law.

By the Court, BEATTY, J.:

The defendant in this case appeals from a conviction of highway robbery. The indictment under which he was tried contains two counts, in the first of which the ownership of the property taken is laid in one Brown, who, as the testimony shows, was merely the driver of the stage upon which it was being conveyed. The second count lays the property in Wells, Fargo & Co. In other respects it is identical with the first. It appears from the bill of exceptions that when the case was called for trial the district attorney "in open court elected to proceed under the first count of the said indictment, and to offer no evidence under any other count, and did not during the progress of the trial offer any evidence under any other count of said indictment except the said first count of said indictment."

But this same bill of exceptions proceeds to show that, notwithstanding this election by the district attorney to confine himself to the first count of the indictment, he did introduce evidence which proved very clearly that some of the property taken at the time of the robbery belonged to Wells, Fargo & Co., and which did therefore in fact support the second count, although we must suppose it was not intended for that purpose. Under these circumstances the defendant, at the close of the trial, requested the court to instruct the jury that if Brown, who was alleged in the first count to be the owner, was merely the driver of the coach as the servant of the proprietors, they must find a verdict of not guilty. The refusal of the court to give this instruction is assigned as error, and is made the basis of a

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very elaborate and, to say the least of it, a very plausible argument in support of the proposition that in an indictment for robbery the ownership of the property cannot properly be laid in one who sustains no other relation to it than that of driver of the coach by which it is being conveyed. There are authorities, however, in direct conflict with this proposition, and the case of *Rex v. Deakin*, cited in 2 East's P. C. 653, was this identical case, except that there the property was stolen instead of being taken by force. But this makes no difference, for it is certain that the rule is no more stringent in cases of robbery than in cases of larceny. The only thing essential in either case seems to be an averment which shall show conclusively that the property does not belong to the defendant. And courts have shown a disposition to allow the proof of any sort of interest in or right to the custody of the property to be sufficient proof of ownership. We are quite willing to go as far in this direction as any respectable precedent will warrant us in going, because the protection of innocence can never by any possibility require any strictness of proof on this point.

Besides, even if the appellant were right in the proposition for which he contends, it is not by any means certain that his instruction ought to have been given. The district attorney was not bound to make an election, and confine himself to one count of the indictment. The very object of the statute in allowing the same offense to be charged in different counts, is to prevent a variance, and that object would be entirely defeated if the district attorney could be compelled to abandon every count but one before the trial. In this case it does not appear that the court compelled an election, and so far as does appear, it was entirely gratuitous on the part of the district attorney. As the defendant had no right to demand the election in the first place, he had no right to insist upon adherence to it unless, in consequence of reliance upon its being adhered to, he had done or omitted to do something by which he would have been prejudiced. But he does not show that he changed his position in any way in consequence of a reliance on the

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election of the first count. If he was induced by the action of the district attorney to omit calling any witness he might have presented that fact by affidavit, and have had it included in the bill of exceptions. In the absence of any such showing it is far from clear that the court erred in refusing to take from the jury the proofs in support of the second count.

The defendant also objected to the following instructions given by the district judge in submitting the case to the jury:

Fifth. "If you believe the evidence given in this case, in order to convict, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt.

Seventh. "The term reasonable doubt is a term often used." (Quoting the definition given in *Commonwealth v. Webster*, and continuing.) "The jury must be satisfied from the evidence of the guilt of the defendant, beyond a reasonable doubt, before the jury can legally find him guilty of the crime charged against him; but in order to justify the jury in finding the defendant guilty of said crime, it is not necessary that the jury should be satisfied from the evidence of his guilt, beyond the possibility of a doubt. All that is necessary, in order to justify the jury in finding the defendant guilty, is that they shall be satisfied from the evidence of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although it may not be entirely proven that the defendant, and no other or different person, committed the alleged offense. And if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be *entirely satisfied* that the defendant, and no other person, committed the alleged offense." Both of these instructions were given and on appeal approved in the case of the *People v.*

Cronin (34 Cal. 191), and were, no doubt, copied from the report of that case. In regard to the first, the court said: "It was but another mode of telling the jury that, although as a general rule circumstantial evidence, in the nature of things, may not be so entirely satisfactory proof of a fact as the positive testimony of credible eye-witnesses, yet they must convict if they were satisfied of the guilt of the defendant to the exclusion of all rational probabilities. There are instances in which circumstantial evidence may be found to produce as strong a conviction of the defendant's guilt, if not stronger, than could be produced by the most direct and positive testimony; yet it is certainly true, as a general proposition, that the latter is the most satisfactory in the estimation of mankind. The court did but recognize this general principle while telling the jury that they were bound to find the defendant guilty upon circumstantial evidence, if it were of such a character as to satisfy them of his guilt, to the exclusion of any other rational theory, and in so doing the court seems to have adopted the precise language of the books. (1 Phillips on Evidence, tenth English and fourth American edition, 113 *et seq.*) If the same absolute certainty of conviction, which is generally produced by the direct and positive testimony of credible eye-witnesses, was required in cases of circumstantial evidence, verdicts of guilty would be rare, and murder frequently go unpunished. Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been."

This quotation from the opinion of Judge Sanderson shows in clear and forcible terms that the first instruction complained of was correct. In regard to the second, he merely says: "What has been said thus far is also a sufficient answer to the objections made to the charge of the court upon the subject of reasonable doubts, as we consider they amount to nothing more than hypercriticism."

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In this part of the opinion also I heartily concur. But the supreme court of California afterwards became hypercritical. In the case of the *People v. Phipps* (39 Cal. 334), Judge Crockett, speaking for himself, said: "I concur in the judgment on the ground [that the court erred in charging the jury 'that if they shall be satisfied from the evidence of the defendant's guilt to a moral certainty, and beyond a reasonable doubt, they must convict him, although they may not be entirely satisfied from the evidence that the defendant, and no other or different person committed the alleged offense.' The first branch of this instruction is a correct exposition of the law; but the latter clause of it is not only calculated to mislead the jury, but is repugnant to the first clause." This view he then proceeds to elaborate. In the case of the *People v. Padilla* (42 Cal. 540), the whole court adopt the foregoing opinion of Judge Crockett, and they reverse a conviction because they think a jury would be confused by the attempt to draw an impossible distinction between satisfaction beyond a reasonable doubt and entire satisfaction. For my part, however, I agree with Judge Sanderson that this is hypercriticism. If a man believes that a defendant may possibly be innocent, he cannot be said to be "entirely satisfied" of his guilt, and yet he may be satisfied of it beyond a reasonable doubt, and may convict, as Judge Crockett admits, and I cannot believe that any man capable of understanding the definition of a reasonable doubt would ever be confused by the statement of a distinction which is so manifest. (9 Nev. 118.)

The judgment of the district court is affirmed.

[No. 791.]

THE STATE OF NEVADA, RESPONDENT, v. J. W.
ROVER, APPELLANT.

PRESUMPTIONS IN FAVOR OF THE RULINGS OF THE COURT.—Where the court overruled the objections made by defendant to the admission of certain evidence, and there was nothing in the record to show whether the evidence was relevant or material: *Held*, that the presumption is that the evidence was properly admitted.

INSTRUCTIONS OF THE COURT—BILL OF EXCEPTIONS.—Instructions given by the court of its own motion will not be considered unless embodied in a bill of exceptions.

REASONABLE DOUBT.—Where the court, in defining reasonable doubt, gave this instruction: "By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life:" *Held*, erroneous. (*State v. Millain*, 3 Nev. 481. Overruled.)

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts sufficiently appear in the opinion.

T. W. Davies, for Appellant.

I. The court erred in allowing the written statement to be admitted in evidence, and in allowing the certificate to be supplied, and especially is this true when the objections to its admission existed as are disclosed by the minutes of the court contained in the transcript. (Art. VI, Amend'ts Const. U. S.)

II. The instructions of the court asked by the plaintiff concerning *murder* and *reasonable doubt* are ambiguous and unintelligible, and were calculated to confuse and mislead the jury.

M. S. Bonnifield, also for Appellant.

J. R. Kittrell, Attorney-General, for Respondent.

By the Court, HAWLEY, C. J.:

The appellant was convicted of murder in the first degree. He appeals from the judgment.

There is no bill of exceptions. The transcript contains

11	343
13	20
14	136
14	446
11	343
25	471
11	343
26	41
26	205

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the indictment, minutes of the trial, instructions which were asked by the prosecution and defense and given by the court, the instructions given by the court of its own motion, the judgment and the notice of appeal. The objection urged to the ruling of the court in allowing the written statement of the defendant as made before the justice of the peace cannot be considered. It is not included in the record and there is no evidence before us to show whether it was relevant or material. The presumption, therefore, is that it was properly admitted. The instructions given by the court of its own motion cannot be considered because not embodied in a bill of exceptions. (*State v. Forsha*, 8 Nev. 137; *State v. Burns*, 8 Nev. 251.) In short there is nothing properly presented for our consideration except the indictment and the instructions which were asked by the prosecution and given by the court. If the instructions would be correct in any conceivable state of the case they must be sustained. (*State v. Forsha*, 8 Nev. 140; *State v. Pierce*, 8 Id. 302; *State v. Keith*, 9 Id. 17.)

No objection is made to the indictment. The instructions of the court, asked by the prosecution, relative to murder and circumstantial evidence, are not erroneous. The objection urged against the instruction concerning "reasonable doubt" is, as made by counsel for appellant, that it is ambiguous and unintelligible, and was calculated to confuse and mislead the jury. It reads as follows: "Reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Reasonable doubt is not mere possible doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation. *By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life.*" Leaving out the sentence in italics, the instruction would, beyond all question, be correct. The first sentence is copied from *The Commonwealth v. Webster* (5 Cush. 320), and has been repeatedly followed and approved. The

second and third sentences likewise contain correct principles of law that have been often affirmed. The last sentence, however, qualifies all that precedes it, and we are called upon to determine whether it properly defines reasonable doubt. It is copied *verbatim* from the instruction in *The State v. Millain* (3 Nev. 451), wherein the court cursorily disposed of the whole question by a reference to only one decided case, and held that this definition of a reasonable doubt was not erroneous. It is apparent that the point at issue received but little consideration.

The rule of law upon this subject is thus laid down by Mr. Greenleaf: "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest." (1 Greenl. Ev., sec. 2.) And by Mr. Starkie as follows: "What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt. * * * On the other hand, a juror ought not to condemn, unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." (Starkie Ev., 865.) This rule has been recognized by several authors on evidence and criminal law as correct. (Wills on Circumstantial Ev., 210, 211; Bish. Cr. Pro., vol. 1, sec. 1052; Wharton's Homicide, sec. 646.)

In Iowa, in a case where the defendants were indicted

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and tried for murder, the supreme court sustained an instruction that "if the whole evidence taken together, produced such a conviction on the minds of the jury, of the guilt of the prisoner, as they would act upon in a matter of the highest importance to themselves, in a like case, it was their duty to convict." (*The State v. Nash and Redout*, 7 Iowa, 385; *State v. Ostrander*, 18 Id. 458.)

In Indiana, upon a prosecution for assault and battery, the supreme court say that, "A reasonable doubt exists, when the evidence is not sufficient to satisfy the judgment of the truth of the proposition, with such certainty that a prudent man would feel safe in acting upon it in his own important affairs." (*Arnold v. The State*, 23 Ind. 170.)

In Missouri, where the defendant was tried and convicted of rape, the court, with great reluctance, sustained an instruction which stated, among other things, that "the jury are at liberty to act upon that degree of assurance such as prudent men properly act upon in the more important concerns of life." (*State v. Crawford*, 34 Mo. 201.) The court say, that this part of the instruction was calculated to mislead the jurors and authorize them to act, in finding their verdict, in respect to which there was no presumption in favor of either side of the question; but, upon considering it with the other portions of the instruction with which it was connected, came to the conclusion that such a construction could not have been adopted by the jury.

In California, in a criminal case where the defendant was convicted of grand larceny, the supreme court, in commenting upon an instruction which had been given, said: "It is not, perhaps, the best definition of a reasonable doubt to say that it is 'such a state of mind as would influence a reasonable man to one cause of action in preference to another in the important affairs of life.' The definition given by Mr. Chief Justice Shaw, is better." (*People v. Ash*, 44 Cal. 289.) As no point was made by counsel upon the instruction, the court did not notice it further, but reversed the judgment on other grounds.

In Minnesota, in a case of conviction of an assault with intent to do great bodily harm, the court reversed the judg-

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ment upon the ground of error in an instruction which charged the jury: "That in order to convict, the jury must be satisfied, beyond a reasonable doubt. That this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty; but the jury should be satisfied as reasonable men, so that they would be willing to act upon it as in matters of great importance to themselves." The court, in rendering its opinion, quote with approval, the rule laid down by Greenleaf, as applicable to all criminal cases, and in commenting upon the language of the instruction, say: "The limitations of the charge are substantially that unreasonable and impracticable things are not required of the prosecution, nor need the proof amount to absolute certainty; on the other hand, it must not be a mere preponderance of evidence. But within these limits any degree of proof upon which as reasonable men they would act in matters of great importance to themselves would be sufficient. Men may, and do, act in matters of great importance to themselves upon strong probabilities, and without that degree of proof which convinces the mind and conscience. But it would be unreasonable for men, in matters of the highest concern and importance to them, to act without a conviction of the truth of the evidence and correctness of the result upon which they base their action. Under this charge the preponderance of proof might be so great as to produce a strong probability of the defendant's guilt—such a probability as men would act upon in matters of great importance, and yet not convince the minds and consciences of the jury beyond a reasonable doubt of the guilt of the defendant." (*State v. Dineen*, 10 Min. 416-7.) 'This decision was approved and followed in *The State v. Shettleworth* (18 Min. 208).

The supreme court of Texas reversed the judgment in a criminal case for error in an instruction which, after stating that defendant was entitled to the benefit of all reasonable doubt, said: "The doubt must not be a mere possible doubt, but it must be a doubt sustained by the evidence, upon a review of all the facts and circumstances of the case,

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such as a reasonable man would act upon in any of the important concerns of life." (*Bray v. State*, 41 Tex. 561.)

In Kentucky, in a case where the defendant was indicted for murder, the supreme court reversed the judgment for error in the concluding portion of an instruction, "that if the conclusion, from the facts and circumstances so proven to their satisfaction be, that there is that degree of certainty in the case that they would act on it in their own grave and important concerns, that that is the degree of certainty which the law requires, and which will justify and warrant them in returning a verdict of guilty." (*Jane, a slave, v. Commonwealth*, 2 Met., Ky., 33.) This is the opinion referred to in the *State v. Millain*.

In North Carolina the court held that it was error to charge the jury that "to exclude rational doubt, the evidence should be such as that men of fair ordinary capacity would act upon it in matters of high importance to themselves." (*State v. Oscar, a slave*, 7 Jones's Law, 305.)

From this review of the authorities it will readily be seen that the language used by Greenleaf and Starkie has generally met with the approval of the courts, and is a safe rule to follow. But wherever there has been a departure from it, however slight, in such a manner as to weaken the amount of proof required as to bring it within a less degree of certainty, the instructions have either been questioned or declared erroneous. With the single exception of the *State v. Millain*, we have found no authority to support the instruction. If this instruction should be sustained, and the opinion in the *State v. Millain*, upheld, the distinction between a civil and a criminal case, as to the amount of proof required, would be entirely overthrown. The jurors are not, by this instruction, required to have their minds and consciences so satisfied as to convince them that they would venture to act upon such conviction in matters of the highest concern and importance to their own interest, but they are told that all that is required by a reasonable doubt is such a doubt as would govern or control them in their "business transactions or usual pursuits of life." What does this mean? Ordinarily men act in the usual business

pursuits of life without considering that their acts involve any question of the life or liberty of an individual. If, for instance, a man is considering whether or not to engage in any particular business, he is usually willing to make the venture if the probabilities of success are greater than the probabilities of a failure. If the information which he obtains is in favor of the venture, he proceeds to act, although not fully convinced that it will prove a success. To ascertain the truth of any given proposition, with reference to the ordinary and usual business transactions of life men are governed and controlled, as juries are in deciding civil cases, by a preponderance of evidence. Men frequently act in their "business transactions or usual pursuits of life" without any firm or settled conviction that the conclusion upon which they act is correct. In these transactions men usually obtain such information as is within their reach, and after deliberating upon the same they form a conclusion upon which they are willing to act without being fully convinced of its correctness. But if it was a matter of the highest concern and importance to their own interests they would not, or at least ought not, venture to act unless convinced to a moral certainty of the truth of the proposition upon which they are called upon to act. The preponderance or weight of testimony upon which men ordinarily would be willing to act in their business transactions, or in the usual pursuits of life, is not the rule that should govern jurors in deciding questions that involve the life or liberty of an individual. In such cases the law requires a much greater degree of certainty. "A distinction," says Greenleaf, "is to be noted between civil and criminal cases, in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a

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rule of criminal law that the guilt of the accused must be fully proved." (3 Green. Ev., sec. 29.) This principle has been recognized by the legislators and jurists of almost every age and country, and is now the law of every wise and civilized nation. The instruction violates this principle.

The opinion in the *State v. Millain*, which evidently induced the attorney to ask, and compelled the court to give, the instruction in the present case, is, in our judgment radically wrong. It will not stand the test of reason, is not supported by the authorities, and is hereby overruled.

The judgment of the district court is reversed, and the cause remanded for a new trial.

[No. 722.]

JAMES T. QUIGLEY, RESPONDENT, v. CENTRAL PACIFIC RAILROAD COMPANY, APPELLANT.

REMOVAL OF CAUSE TO FEDERAL COURT—ACT OF CONGRESS OF MARCH 25, 1867, CONSTRUED.—Under the provisions of the act of congress "approved March 2, 1867," the existence of local prejudice need not be shown. The act only requires the person making the affidavit to state the fact, no reasons therefor need be assigned, as the question whether such bias or prejudice exists is not left to the judicial determination of the court.

IDEM—FOREIGN CORPORATION.—A corporation is a citizen of the state where it is created, and it can be a "citizen of another state," within the meaning of the words as used in the act.

IDEM.—An affidavit made by the vice-president of a corporation "that he has reason to believe, and does believe, that from prejudice and local influence, said defendant corporation will not be able to obtain justice in said court," is insufficient to authorize the state court to transfer the cause to the federal court.

IDEM—AFFIDAVIT BY WHOM MADE.—The affidavit must be made by the party to the suit. It is the belief of the citizen of another state, not the belief of such citizen's agent, that deprives the state court of its jurisdiction.

IDEM—AUTHORITY OF THE CORPORATION TO MAKE THE AFFIDAVIT.—The question as to the power of a corporation to make the affidavit, discussed: *Held*, the affidavit must state that it is the belief of the defendant, and that the authority from the corporation to make the affidavit must in some manner affirmatively appear.

CORPORATION LIABLE FOR THE WANTON ACTS OF ITS AGENTS.—A railroad corporation is liable for the willful, wanton and malicious acts of its

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agents, while acting in the course of its business and of their employment, although the act was not directly or impliedly authorized nor ratified by the corporation. (*By Hawley, C. J.*)

IDEM—EXEMPLARY DAMAGES.—The question of exemplary damages discussed in the opinion: *Held*, that under the facts of this case the jury were not warranted in assessing damages as a punishment of defendant independent of the question of full compensation.

EJECTION FROM RAILROAD CAR, WHEN UNLAWFUL.—It is the duty of the agents of a railroad company to ascertain whether a passenger has purchased a ticket before ejecting him from the cars; their negligence in this respect cannot be pleaded or urged as a defense, nor considered in mitigation of damages.

IDEM.—If it afterwards turns out that the passenger had a ticket, then no matter how much the agent was mistaken, nor how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong, and for any injury which the passenger received on account of such expulsion he is entitled to full compensation in damages.

IDEM—AGGRAVATION OF DAMAGES.—If the agent uses more force than is necessary to eject a passenger, or uses vile epithets toward him, such conduct should always be considered by the jury in aggravation of damages.

IDEM—MEASURE OF DAMAGES.—Where the agent in ejecting a passenger uses no more force than is necessary for that purpose: *Held*, that the passenger is entitled to receive such damages as will fully compensate him for the actual injury inflicted, whether it be to his body or his mind, to his business or loss of time, as well as his actual expenses necessarily incurred in consequence of the unlawful or wrongful act.

IDEM—EXCESSIVE DAMAGES.—Where plaintiff purchased a ticket at Elko for San Francisco, and was ejected from the cars within half a mile from the town of Elko, without sustaining any bodily injuries, the conductor using no more force than was necessary to eject him; was delayed one day, and had to buy another ticket at an expense of \$40.50: *Held*, that a verdict of \$5000 was so excessive as to indicate passion and prejudice upon the part of the jury.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The facts are stated in the opinion.

T. B. McFarland, for Appellant.

I. The refusal of the court below to grant appellant's petition to remove the cause to the United States Circuit Court was clearly error, for which the judgment should be reversed. (U. S. Statutes at Large, vol. 14, 558; *Stevens v.*

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Phoenix Insurance Co., 41 N. Y. 149; *Insurance Co. v. Dunn*, 19 Wall. 214; *State v. Curler*, 4 Nev. 445; *Caples v. Central Pacific R. R. Co.*, 6 Id. 265; *Kanouse v. Martin*, 15 How. 198; 14 Id. 23; *Gordon v. Longest*, 16 Pet. 97.)

II. Exemplary damages could not be given in this case, and the court below erred in ruling upon all the instructions presented upon that subject. (*Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Wardrobe v. California Stage Co.*, 7 Cal. 118; *Turner v. North Beach & Mission R. R. Co.*, 34 Id. 594; Story on Agency, section 456; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25; *Pittsburg, F. W. & Chicago R. R. Co. v. Slusser*, 19 Ohio St. 157; *Wright v. Wilson*, 19 Wend. 343.)

III. Mental anguish can be considered in estimating damages only where it is an incident to bodily pain, and the court below erred in refusing to give the third instruction asked by appellant's counsel, and refused. (*Johnson v. Wells, Fargo & Co.*, 6 Nev. 236.)

IV. Under any view of the case, the amount of the verdict was excessive beyond all reasonable bounds. (*Chicago, B. & Q. R. R. Co. v. Parks*, 18 Ill. 460; *Terre Haute & St. L. R. R. Co. v. Vanatta*, 21 Id. 188; *Tarbell v. C. P. R. R. Co.*, 34 Cal. 616; *Pleasants v. N. B. & M. R. R. Co.*, 34 Id. 586; *Chicago v. N. W. R. R. Co.*, 48 Ill. 253; *Chicago & Alton R. R. Co. v. Roberts*, 40 Id. 503.)

James Seeley, for Respondent.

By the Court, HAWLEY, C. J.:

This action was brought by plaintiff Quigley to recover from the defendant, the Central Pacific Railroad Company, damages for an alleged unlawful ejection from defendant's cars.

The jury found a verdict in favor of plaintiff and assessed the damages at \$5000. Defendant moved for a new trial which was refused. The appeal is taken by defendant from the judgment and from the order of the district court overruling its motion for a new trial.

Prior to the trial of the case the defendant moved the

court to transfer the suit to the circuit court of the United States for the district of Nevada, in pursuance of the provisions of the amendatory act of congress, "approved March 2, 1867," which provides: "That where a suit * * may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court, and it shall be, thereupon, the duty of the state court to accept the surety and proceed no further in the suit." (14 U. S. Stat. at Large, 558.) The petition and bond filed by appellant state the facts as required by the act. The petition is signed "Central Pacific Railroad Co., by E. H. Miller, Jr., Secretary," and by the attorneys for defendant. The bond is signed "Central Pacific Railroad Co., by E. H. Miller, Jr., Secretary," and by two sureties." A seal purporting to be the seal of the corporation is affixed to the petition and bond. The affidavit is as follows:

"[Title of court and cause.]

"State of California, City and County of San Francisco, ss.

"Charles Crocker being duly sworn, deposes and says: that he is the second vice-president of the Central Pacific Railroad Company, the defendant in the above-entitled ac-

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tion; that Leland Stanford is the president of said company, and Collis P. Huntington is the first vice-president of said company; that said Stanford and Huntington are at the present time in the city of New York, and therefore unable to make this affidavit; that said Central Pacific Railroad Company is a corporation duly organized under the laws of the State of California, having its principal place of business at the city and county of San Francisco, in said state, and is the defendant in the above-entitled action; that said action was brought on or about the fourth day of April, 1874, in the above-entitled court, * * * that said plaintiff * * * is and has been since the nineteenth day of August, A. D. 1874, a citizen of the United States residing in the State of Nevada. And this deponent further says: That he has reason to believe, and does believe, that from prejudice and local influence, said defendant corporation will not be able to obtain justice in said court, and affiant therefore makes this affidavit for the purpose of removing said suit into the circuit court of the United States, for the district of Nevada, * * . in pursuance of the statute in such case made and provided, and further saith not.

“(Duly verified.)

CHARLES CROCKER.”

The plaintiff objected to the sufficiency of the petition, bond, and affidavit. The objections to the petition and bond were made upon the ground that they were not signed by the defendant, and contained no evidence that E. H. Miller, Jr., was authorized by the defendant to sign the same; and the further ground that the seal thereto affixed was not attested, nor in any manner authenticated as the seal of defendant. The objection to the affidavit, as made in the court below, reads as follows: “Third. That one of the grounds for removal of said cause, as stated in said pretended petition is that one Charles Crocker has reason to believe, and does believe, that from prejudice and local influence, said corporation will not be able to obtain justice in said court. *That said affidavit is the mere opinion of said Charles Crocker, and does not show that such is the opinion of the defendant; nor does said affidavit show that said*

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affiant has any authority from defendant to make such affidavit; nor does said affidavit or petition set forth any grounds or reason upon which this court can judicially determine that either bias or prejudice exists in the county of Elko against defendant. Fourth. That said pretended affidavit is without any seal of defendant authenticating said affidavit as being the averment or statement of defendant." The objections to the petition and bond are not well taken. As they were virtually abandoned by respondent's counsel it is unnecessary to further notice them. In the oral argument, counsel for respondent relied upon the objections to the affidavit which we have italicised. It was admitted that if the application conformed to the provisions of the act, the existence of local prejudice need not be shown; and it was so decided in *Meadow Valley Mining Company v. Dodds* (7 Nev. 147). The act of congress only requires the person making the affidavit to state the fact. No reasons therefor need be assigned, as the question whether such bias or prejudice exists is not left to the judicial determination of the court. The act of congress is plain and imperative, and leaves nothing to be construed. When the petition, bond, and affidavit are filed as required by the act, it positively declares that it shall be the duty of the state court to accept the security, and proceed no further in the suit. Is the affidavit in other respects sufficient? Must the authority to make the affidavit be affirmatively shown? The questions presented by the objections are raised for the first time in this state, and are of great importance. No authorities bearing upon the points were cited by counsel on either side, and but few could be found which add any light to the answers that must be given to the questions we have propounded. A corporation cannot, from the very nature of its existence, make the affidavit in person. It has no mind, no reasoning faculties; no power to think, speak, or act, except through its officers, agents, servants, and employees. In what manner, then, can the corporation, if at all, make such an affidavit as will be sufficient to authorize the removal of a cause under the act of congress under consideration.

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In the case of the *Meadow Valley Mining Company v. Dodds*, *supra*, the affidavit was made by the superintendent of the corporation, and Lewis, C. J., in delivering the opinion of the court, said: "The application in all respects conformed to the provisions of the act;" but the point here urged was not there relied upon, and hence the remark quoted cannot be considered as an authority in favor of the sufficiency of the affidavit. An examination of that case shows that it was there admitted that the affidavit was "sufficient in all respects, except that it does not set out the facts upon which the appellant bases his belief that such local prejudice existed that he could not obtain justice." This, together with the constitutionality of the act, were the only questions considered and passed upon by the court. As the act of congress takes from the state court the power to judicially determine whether or not any local prejudice exists that would prevent the moving party from obtaining justice, it ought to be strictly construed. "The character of the act, its object, and its effect upon litigation in the state courts," as was said by the supreme court of New York, "is not such as to call for a liberal construction of its privileges. On the contrary, it should be strictly construed, and a party seeking to avail himself of its privileges, must come clearly within its provisions." (*Cooke v. The State National Bank of Boston*, 1 Lansing, 501.) In this case, the question whether a corporation could make the affidavit was referred to, but not decided. Ingraham, J., in delivering the opinion of the court, said: "There is also one objection made to the fact, that the statute does not apply to a corporation, because a corporation cannot make the affidavit required, and the belief of other persons than the defendant is not a compliance with its provisions. The objection is not without weight; and it may well be doubted whether an affidavit, made by one or more of the directors, is a compliance therewith; but it is unnecessary to decide on that question." This *dictum* was expressed in a case where the affidavit for removal was made by the president and nine directors of the corporation. The language of the affidavit being: "We also, each for himself, severally do declare, and upon oath

say, that we have reason to believe, and severally do believe, that from prejudice and local influence, the said State National Bank of Boston will not be able to obtain justice in the said suit in the said state court." This cause was taken up to the court of appeals, and Church, C. J., in delivering the opinion of the court, upon this point, said: "The last objection to the validity of the removal is, that a corporation cannot avail itself of the act of 1867 by reason of its incapacity to make the affidavit required by the act. It is urged by counsel that this act confers upon one party extraordinary power over the litigation, enabling it, by an *ex parte* oath of mere belief of the existence of a fact, which cannot be contradicted, and after having the benefit of all the 'law's delay' in the state court, to remove the suit to another court, and that it should be strictly construed, and hence that it should be held to apply to such a party only as is capable of entertaining and expressing a belief, and that the affidavit can in no case be made by any other than the party himself. There is a difference of opinion among the members of the court upon the point; and upon consultation we have concluded, as probably the most conducive to the interests of both parties in facilitating the final disposition of the case, to sustain the objection, and hold that it was not removed." (*Cooke v. State National Bank of Boston*, 52 N. Y. 114.)

We think this case goes too far. It is now too well settled to be questioned, that a corporation is a citizen of the state where it is created, and it certainly can be a "citizen of another state" within the meaning of the words as used in the act of 1867. If it is a citizen of another state, by presenting and filing the necessary papers, it would certainly be entitled to have the suit removed. True, the corporation could not, in person, make the affidavit. But, suppose the board of directors at a regular meeting should pass a resolution declaring that the corporation has reason to, and does believe that, from prejudice and local influence, it will not be able to obtain justice in such state court, and authorizes its president, or some other person, to make and file an affidavit of this fact in said court, would this not be suf-

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ficient? We think it would. Whether it is absolutely necessary that the authority of the corporation should be given in the manner here indicated need not be determined in this suit. The objection we are considering is based upon the ground that the affidavit, as to the belief, is the mere opinion of Charles Crocker, and not the opinion or belief of the defendant, and our conclusion is that this objection is well taken. We are also of opinion that the authority from the corporation to make the affidavit, must, in some manner, affirmatively appear. In *Mahone v. Manchester and Lawrence Railroad Corporation*, which was a suit brought to recover damages for an injury sustained by plaintiff while a passenger in the cars of defendant, the corporation moved for a transfer of the cause from the state to the federal court, under the same act of congress. The affidavit was by the acting and assistant superintendent of the defendant, and the objection here presented was there made and held to be good. The opinion was by a full bench. Gray, J., in delivering it, after referring to the fact that the act had been declared constitutional, and, that in order to authorize a removal, the requirements of the act must be strictly and fully complied with, said: "Among the conditions which the act of congress imposed upon the removal of the case, are that 'such citizen of another state' shall file a petition for the purpose, and that 'he will make and file' in the state court 'an affidavit that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court.' The act of congress does not, like our statute for the removal of actions from the superior court upon application of the defendant to this court for trial, authorize the affidavit to be made by the party or by any person in his behalf. * * * Congress may well have thought it not too great a security against abuse of the power of removal, to require the party's own affidavit to a fact of such a nature, and of which no further proof is to be made at any stage of the proceedings. Whatever may be the reasons, the words of the statute are explicit, and require the affidavit, as well as the petition, to be the act of the party. (*Anon* 1 Dillon, 298, note; *Hersch-*

feld v. Clarke, 11 Exch. 712.) When, as in this case, the petitioner for removal is a corporation, the petition may doubtless be signed and the affidavit made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear." (111 Mass. 75.)

It might be urged that inasmuch as no officer of a corporation, unless specially authorized, has power to bind the corporation except in the discharge of his ordinary duties, and inasmuch as it is no part of the ordinary duties of the superintendent of a railroad to represent the corporation in judicial proceedings, that a distinction ought to be drawn between the case referred to and the one under consideration, where the affidavit is made by the acting president, who is at the head of the corporation, and invested with greater power than any other officer. This question was mooted in the Massachusetts case, and the language we have quoted from the opinion, may be considered as modified to some extent, from the fact that it appeared from the bill of exceptions in that case "that Hildreth, by whom the petition for removal was signed, and the affidavit in support thereof made, had no authority except what was incident to his office as assistant and acting superintendent of the defendants," and for this, as well as the other reasons given in the opinion, it was held, "that the petition and affidavit were not the acts of the corporation." But from the view we take of this question and the gist of the objection made and authorities cited, this distinction as to the ordinary duties of the respective officers of a corporation makes no difference. The objection is, that the individual belief of an officer or agent of a corporation does not answer the positive requirements of the statute. The affidavit must be made by the party to the suit. It is the belief of the "citizen of another state," not the belief of such citizen's agent, that deprives the state court of its jurisdiction. As the affidavit in this case did not conform to the requirements of the act of congress the court did not err in proceeding with the trial of the case.

2. At the trial plaintiff testified, that he applied to the

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ticket-agent of defendant for a ticket from Elko to San Francisco, and procured from the agent a ticket numbered 1496, paying therefor the sum of forty dollars and fifty cents. There is some controversy as to what transpired at the ticket-office. Mr. Pixley, the agent, testifies, that after the money had been paid, and at plaintiff's request, he went to the ticket case and took out a ticket, and, as he stamped it, saw by the number that plaintiff had got his ticket; that he laid the ticket on the counter not intending to deliver it to plaintiff; that he told plaintiff he could not deliver to him another ticket, and that thereupon the plaintiff took the ticket, and refused to return it. Plaintiff denied having more than one ticket; the agent contended that he had given him a ticket numbered 1495, and that he had no right to the ticket No. 1496. The ticket-agent, prior to the departure of the cars, informed the conductor of the train of what had happened, and the conductor requested the plaintiff to return ticket 1496. When the train started, the ticket-agent undertook to prevent the plaintiff from getting on the cars, and told him he could not ride on that ticket. Plaintiff threw his baggage on the cars and got on the train while it was in motion. When the conductor demanded his ticket he gave him ticket No. 1496. Thereupon the conductor requested him to get off the cars, stating as a reason for such request, that plaintiff had not paid for that ticket. A colloquy occurred; the plaintiff, as he testifies, wishing to explain about the misunderstanding at the office, and the conductor insisting that he did not wish to listen to any explanation. The result was, that plaintiff, against his remonstrance, was forcibly ejected from the defendants' cars by the conductor. No more force was used than was necessary to accomplish the purpose. Plaintiff was ejected at a point on the road distant from Elko over a quarter of a mile. After plaintiff was ejected he again got on the cars for the purpose of getting his valise, and, as he states, at this time the train was running so fast that he was afraid to get off. Plaintiff asked the conductor to let him ride to Carlin (the next station on the road), and stated that if he could not satisfy him that they had no right to put him off

the cars, he would get off. The conductor refused to let him ride to Carlin. Neither the ticket or the money was returned to plaintiff. Plaintiff, on account of his expulsion from the cars, was delayed one day, and had to buy another ticket, paying therefor the sum of forty dollars and fifty cents. There was some testimony tending to show that the conductor was angry, and that the conversation between the conductor and plaintiff was of such a character as to attract the attention of the passengers on the cars.

It is admitted by counsel for appellant that the act of the conductor in ejecting plaintiff from the cars was within the scope of his authority, in the prosecution of the business entrusted to him by defendant, and that if the act was unwarranted and unlawful, the defendant was liable in damages therefor, notwithstanding the fact that the conductor acted in good faith, in the honest belief that the plaintiff had no right to a passage upon ticket No. 1496. But it is argued that the corporation is not responsible for the wanton or malicious acts of its servants; that in such cases the corporation cannot be held liable in exemplary or punitive damages, and that the court therefore erred in submitting this question to the jury in the following instructions: "First. The jury are instructed that a corporation is liable to exemplary damages for such acts, done by its agents or servants, acting within the scope of their employment, as would if done by an individual acting for himself, render him liable for such damages."

"Second. The jury are instructed that for acts done by the agents of a corporation, either *in contractu* or *delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible in similar circumstances."

"Fifth. If the jury believe, from the evidence, that the plaintiff did purchase, pay for, and receive from defendant, at Elko, a first-class passenger ticket, issued by defendant as a permit to the owner to ride upon its passenger cars from Elko to San Francisco; and that defendant took from plaintiff said ticket whilst plaintiff was on said cars as a passenger, *en route* to San Francisco, and forcibly ejected

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plaintiff from its said cars; and that such acts of defendant were done wantonly or maliciously, or with a reckless disregard of the rights of plaintiff, then the plaintiff is entitled to recover exemplary damages."

While there is some conflict in the decided cases, we are of opinion that the weight of reason and authority is decidedly in favor of the rule that a corporation is liable for the wanton and malicious acts of its agents. If the agent or servant of a corporation assaults a stranger, the corporation is not in any way liable; but the rule is different where the assault is made upon a passenger of the corporation. It is the duty of every railroad corporation to carry its passengers safely, and to treat them respectfully. They should protect their passengers from violence and insult, and are bound to use such reasonable precautions as human judgment and ordinary foresight are capable of, in order to make the journey safe and comfortable. In the language of the authorities they are bound to protect their passengers not only against the violence and insults of strangers and co-passengers, but *a fortiori*, against the violence and insults of their own conductors, agents and servants, and if this duty is not performed, they should, of course, be held responsible. In Angell & Ames on Corporations, the authors say: "A distinction exists as to the liability of a corporation for the willful tort of its servant towards one to whom the corporation owes no duty, except such as each citizen owes to every other, and that towards one who has entered into some peculiar contract with the corporation, by which this duty is increased. Thus it has been held that a railroad corporation is liable for the willful tort of its servants whereby a passenger on the train is injured." (Sec. 388.)

Mr. Redfield, in reviewing the decision of the court in *Hagan v. Providence and Worcester Railroad Co.*, 3 Rhode Island, 88, wherein the court had declared that the corporation could not be held liable for the wanton and malicious acts of its agents unless it participated in the wrongful act of its agent or expressly or impliedly authorized, or approved it, said: "But upon principle, it would seem that if the agent was so situated as to represent the company in

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the particular transaction, and for the time, they should be liable to the same rule of damages as the agent, although the form of action may be different. If the act is that of the company, they should be held responsible for all its consequences, and there seems quite as much necessity for holding the company liable to exemplary damages as their agents. It is difficult to perceive why a passenger, who suffers indignity and insult from an inexperienced or incompetent conductor of a train, should be compelled to show the actual ratification of the act of the conductor, in order to subject the company to exemplary damages, if the transaction was really of a character to demand such damages, and the company are liable at all." (Red. on Railways, Vol. 2, sec. 187, note.) The authorities make the test of the liability of the corporation, not the intention of the servant, but the fact that the injurious acts were done by the servant while engaged in the business of the corporation, and within the scope of his duty as a servant. When the servant acts within the scope of his employment and is engaged in the business of the corporation, in other words, doing what he is employed to do, and violates the rights of a passenger, there is no valid reason why the corporation should not be held responsible for his acts simply because such servant acted willfully, wantonly or maliciously in the commission of the act.

In *Goddard v. The Grand Trunk Railway of Canada*, the court review at length the authorities, and in concluding upon this point, say: "The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business, impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. * * * If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed,

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and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit the damages are generally limited to compensation. In actions of tort the jury are allowed greater latitude, and, in proper cases, may give exemplary damages." (57 Maine, 217.) The court then cited numerous authorities to show that the doctrine of exemplary damages is sanctioned by the rules of the common law; that its existence as a fundamental rule of the law, has been recognized in England for more than a century, and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and that the decisions of the courts are now nearly unanimous in its favor.

The following authorities sustain the proposition that a corporation is liable for the willful, wanton and malicious acts of its agents, while acting in the course of its business and of their employment, although the act was not directly nor impliedly authorized nor ratified by the corporation; and, where the question is considered that the corporation in such cases is liable in exemplary damages. (*Moore v. Fitchburg Railroad Corporation*, 4 Gray 465; *Philadelphia and Reading Railroad Company v. Derby*, 14 How. 468; *The Pennsylvania Railroad Company v. Vandiver*, 42 Penn. Stat. 365; *Weed v. The Panama Railroad Company*, 17 N. Y. 362; *Dalton v. Beers*, 38 Conn. 529; *Hopkins v. The Atlantic and Saint Lawrence Railroad*, 36 N. H. 9; *The Baltimore and Ohio Railroad Company v. Blocher*, 27 Md. 277; *Pittsburg, Fort Wayne and Chicago Railroad Company v. Slusser*, 19 Ohio Stat. 157; *Atlantic and Great Western Railway Company v. Dunn*, 19 Id. 162; *The Philadelphia, Wilmington and Baltimore Railroad Company v. Quigley*, 21 How. 202; *Storey on Agency*, sec. 452; *Hanson v. European and North American Railway Company*, 62 Maine, 84; *The New Orleans*,

Jackson and Great Northern Railroad Company v. Hurst, 36 Miss. 660.)

But while this rule is, in our judgment, correct, we find quite a diversity of opinion as to what is really meant by the term "exemplary damages." Mr. Sedgwick, after discussing the question of compensatory damages, says: "Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression, intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule * * * seems settled in England, and in the general jurisprudence of this country." (Sedgwick on Damages, ch. I, mar. p. 38; ch. XVIII, 464, *et seq.*) In many of the authorities cited in support of this view, it is stated that exemplary or punitive damages can only be given where, in the character of actions like the one under consideration, the injury to the passenger is the result of the wanton or malicious acts of the agents of the corporation committed in reckless or willful disregard of the rights of the injured party. In the language of these authorities it is only in the extreme cases, where the law blends the interests of the party injured with the interests of the public, that the jury are permitted to give such damages, not only to compensate the injured party, but also to punish the defendant in order that it may serve as a warning and example to others.

Mr. Greenleaf takes an entirely different view of this question. "Damages," says this author, "are given as a compensation, recompense, or satisfaction, to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this whether it be to his person or estate." (Vol. II, Greenleaf on Ev., sec. 253, and authorities there cited, and reviewed in a note to this section.)

In *Fay v. Parker* (53 N. H. 342), the supreme court adopt the views expressed by Mr. Greenleaf, and in a very elaborate and able review of the authorities, both in England and in the United States, argue that upon principle it is established that the plaintiff in any civil action founded upon a tort, punishable by the criminal law, cannot recover exemplary, punitive, or vindictive damages in order to punish the defendant. But that in such actions the plaintiff is entitled to recover an amount of damages equal to the full compensation of the plaintiff for the injuries sustained by him. That damages mean *loss*, and that the plaintiff can only recover the thing taken away; that "the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage."

Foster, J., in delivering the opinion of the court, shows that in many of the decided cases the words exemplary, vindictive, and punitive or punitory (all meaning the same thing), have been used indiscriminately in cases where the injuries inflicted were such as to call for damages of a compensatory character purely, but aggravated by the peculiar circumstances of the parties and the occasion, and he insists that these terms only mean that the jury can consider the aggravation in fully compensating plaintiff for his loss and injury, and not as a punishment for defendant; that these terms mean compensatory damages—nothing more or less, and have reference only to such damages as are thus spoken of by Greenleaf: "It is frequently said, that in actions *ex delicto*, evidence is admissible in *aggravation* or in *mitigation*, of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the *injury itself*. The circumstances, thus proved, ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive." (2 Greenl. Ev., sec. 266.) Without any further reference to the respective views of these distinguished au-

thors, we think it must be admitted that judges have very often, in giving instructions, or in writing opinions, used the terms exemplary, punitive, vindictive, and compensatory damages in such a manner as to confuse, rather than to enlighten, the profession upon the subject; and it is not, perhaps, an easy task to lay down definite rules by which juries are to be guided in all cases. It should, however, be the duty of *nisi prius* courts, as far as possible, to prevent the jury from acting upon improper theories as to what should be regarded by them in estimating the elements which go to make up the *quantum* of damages which plaintiff is entitled to recover. We are of opinion that the facts of this case did not warrant the jury in assessing damages as a punishment of defendant, independent of the question of full compensation, and it does not appear from the instructions given that they were expressly authorized so to do. Whether such damages can be assessed in any case of tort to the person is a question of great importance, which ought to be decided by, or at least submitted to, a full bench, and as the decision of this question is not necessarily involved in the decision of this case, it need not be, and is not, here determined.

We have, in another part of this opinion, considered the rights of the plaintiff as a passenger upon the cars, and the duties of defendant as a common carrier. It is, undoubtedly, true that if the plaintiff paid for and received ticket No. 1495, and afterwards received ticket No. 1496 without paying any consideration therefor, then, in the language of one of defendant's instructions as given by the court, "he had no right to ride thereon; and unless he produced the first-mentioned ticket, or paid his fare to the conductor, the conductor was justified in ejecting him from the car, and was authorized to use such force as necessary for that purpose."

But in ejecting plaintiff from the cars without knowing whether he had paid for the ticket No. 1496, the defendant acted at its peril. If the facts were, as the jury afterwards found, that plaintiff had paid for a ticket and only received ticket No. 1496, then he had the unquestioned right to ride on the cars without molestation from any one. It was the duty

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of defendant's agents to ascertain the facts before they took the responsibility of ejecting plaintiff from the cars. Their negligence in this respect cannot be pleaded or urged as a defense; nor considered in mitigation of damages. The risk was with defendant, and if it afterwards turned out that it acted upon an erroneous impression as to the facts, then, no matter how much its agent was mistaken, nor how honestly he may have believed that plaintiff had not paid for his ticket, or how little force was used in ejecting the plaintiff, the act was nevertheless unlawful and wrong, and for any injury which the plaintiff received on account of such expulsion he is entitled to full compensation in damages. If the conductor had used more force than was necessary to eject the plaintiff, or had used vile epithets toward him, then such conduct upon his part should be considered by the jury in aggravation of the damages. But if the act of ejection was unwarranted by the facts, then, although the conductor may have acted with the true courtesy and politeness of a Chesterfield, using no more force than was necessary to accomplish his purpose, the defendant, if plaintiff was wholly without fault, would be legally responsible for all the injuries necessarily resulting to plaintiff on account of the unlawful act of the conductor.

3. This view of the case brings us to the consideration of the question whether the court erred in refusing to give the several instructions asked by defendant's counsel, which tended to limit the amount of damages that plaintiff was entitled to recover, to the price of another ticket, and compensation for one day's loss of time. These instructions were to the effect, that if the jury believed, from the evidence, that the plaintiff purchased and paid for ticket No. 1496; but that the agent and conductor honestly believed, and had good reason to believe that he had not paid for said ticket, and that the defendant's agent used no more force than was necessary in ejecting plaintiff from the cars, and did not make any unnecessary disturbance to attract the attention of the passengers in so doing, "then," as stated in the second instruction, "the plaintiff * * * is only entitled to recover such damages as he may have sus-

tained by reason of said ejectment." Again, in the sixth instruction it is claimed that "the measure of damages would be the cost of the plaintiff's ticket and his necessary expenses while he was detained at Elko, with the lawful interest upon both amounts, and the value of his time while he was so detained." And in the third: "The jury are instructed that mental anguish or pain of mind cannot be considered as a distinct element of damage. Pain of mind or mental anguish as an element of damages can only be considered in connection with bodily suffering, and when there has been none of the latter, the jury should not consider the former." The defendant, in support of these instructions, principally relies upon the case of *Johnson v. Wells, Fargo & Co.* (6 Nev. 224), and if this opinion, in so far as it declares that pain of mind or injury to plaintiff's feelings cannot be considered "aside and distinct from bodily suffering," is correct, and is applicable to a case like the one under consideration, the instructions ought to have been given.

In *Johnson v. Wells, Fargo & Co.*, the plaintiff was a passenger upon defendant's stage-coach, and received bodily injuries by the upsetting of the coach, through the negligence of the defendant. The instruction which was there given authorized the jury in estimating the damages to take into consideration "the bodily suffering of the plaintiff, his pain of mind," etc., etc. The objections were to the words "his pain of mind," and a majority of the court held that the plaintiff was not entitled to any damages for "his pain of mind, aside and distinct from his bodily suffering."

A careful examination of all the authorities cited and reviewed in *Johnson v. Wells, Fargo & Co.*, and of the subsequent cases of *Pennsylvania and Ohio Canal Co. v. Graham*, 63 Penn. St. 290; *Smith v. Holcomb*, 99 Mass. 552; *Holyoke v. Grand Trunk Railway*, 48 N. H. 541; *Matheson v. New York Central R. Co.*, 62 Barb. 364; *Smith v. Overby*, 30 Geo. 241; *Cox v. Vanderkleed*, 21 Ind. 164; *Gould v. Christianson*, B. & H. 507; *Cooper v. Mullins*, 30 Geo. 152, and *Fay v. Parker*, *supra*, which bear more or less upon the point decided, has convinced me that the instruction in *Johnson v.*

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Wells, Fargo & Co., in the particulars referred to, was correct. But whatever the differences of opinion may be in actions like that of *Johnson v. Wells, Fargo & Co.*, there ought not, in my judgment, to be any controversy that in a case like the present, the measure of damages in the instructions under review is not properly stated.

It is a well settled principle of law, recognized by all of the authorities, that if the plaintiff is bodily injured by the wrongful act of the defendant, he would be entitled to compensation for such an injury. The theory upon which such compensation is allowed being that the injured party, himself without wrong, is entitled to compensation for all the injuries naturally and necessarily resulting from the wrongful act of the party who caused the injury. In such cases the jury are authorized to give such damages as will make the injured party whole for all the injuries resulting directly from the wrongful and unlawful act, without any regard to the motives that may have induced the commission of the act. This rule is certainly founded upon the plainest principles of natural justice, for, even, as between innocent parties if an injury has occurred and damages been sustained, he that caused the injury must bear its consequences. If it be true that an injured party may be indemnified against the physical suffering, why not against mental suffering as well? The humiliation and mortification of being publicly, as well as forcibly, ejected from the cars upon which plaintiff, if he had paid his fare, and otherwise properly conducted himself, had a right to ride, is as much an injury to his person as if he had received bruises upon his body and suffered physical pain. Take for instance a case of assault and battery committed on the person by pulling plaintiff's nose or spitting in his face, the object being solely to degrade him. What is the actual injury? Is it the bodily suffering? Certainly not. That amounts to nothing compared to the injury to his feelings, to his honor, his pride, and his social position. In such a case, would any one question for a moment the right of a jury to give liberal damages to compensate plaintiff for the actual injury received. The principle is the same when applied to the case under consideration. The differ-

ence is only in degree. The principle applies with equal force to all cases, the rule being that plaintiff is entitled to receive such damages as will fully compensate him for the actual injury inflicted, whether it be to his body or his mind, to his business or loss of time, as well as the actual expenses necessarily incurred in consequence of the unlawful, wrongful or negligent act of the party.

In *Hamilton v. Third Avenue Railroad Company*, a case almost identical to the one under consideration, the injury complained of being the forcible ejection of the plaintiff from a car of the defendant by the conductor for his refusal to pay the fare demanded from him, the plaintiff claiming that he was not liable for the fare because he had taken passage upon another car of the defendant and paid the entire fare which entitled him to a through passage to the city hall, from which at an intermediate point he was transferred to the one in question. No unnecessary force was used in ejecting the plaintiff, and he sustained no material injury therefrom. The conductor acted in good faith, honestly believing that the plaintiff had no right to a passage unless he paid the fare demanded from him. Upon this state of facts the court say: "It follows that if the plaintiff was entitled to a passage on the car in question without the payment of any additional fare his ejection therefrom was unlawful, and gave him the right to recover from the defendant the damages thereby sustained irrespective of the motives of the conductor in putting him off. This right would not be impaired by showing that the conductor acted in good faith in the honest belief that the plaintiff had no such right, and that he was acting in the strict performance of his duty to the defendant. The act, nevertheless, was unlawful, and being so, the plaintiff had a right to compensatory damages therefor. These included not only compensation for the loss of time and the amount the plaintiff was obliged to pay for passage upon another car, but in addition thereto the injury done to his feelings might be taken into consideration by the jury and a suitable recompense given therefor." (53 N. Y. 28.)

In *Smith v. Pittsburgh, Fort Wayne & Chicago Railway*

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Company, supra, similar to the case above cited, the majority of the court were of opinion, "that injuries to the person, whether they consist of mental or physical pain, as well as loss of time or property, which naturally and necessarily result from the wrongful and deliberate act of the defendant, are proper subjects for the consideration of the jury in their estimate of compensatory damages." McIlvaine, J., in delivering the opinion of the court, after stating that bodily pain, caused by an act of trespass on the person, constituted a legitimate ground for compensatory damages, said: "And why should not mental suffering as well? Is it more endurable than physical suffering? Is it a less probable consequence of a trespass against the person of another? Is the mind an object of less concern in the judgment of the law than the body? Is it any less a part of the person? Is compensation in money for mental suffering more difficult to estimate than for physical pain? I can find no good reason for affirming any of these distinctions. Conceding, therefore, that the case made against the defendant would not have justified a verdict for damages beyond the rule of compensation, * * * a majority of the court are of opinion that there was no error in this charge, to wit: that in estimating the damages 'sustained' by the plaintiff in the premises, 'the injury to the feelings caused by a public expulsion from the cars,' was a proper subject for the consideration of the jury."

4. Upon a careful consideration of the testimony in this case, it is evident that the amount of the verdict could only be sustained, if at all, upon the theory that the jury had a right not only to assess damages in full compensation for the injury which plaintiff actually received; but in addition to award further damages solely as a punishment to defendant, that might serve as a warning and example for the protection of the public. This was clearly erroneous, and even for argument sake admitting that such damages were allowable, the amount of the verdict is so excessive as to indicate passion and prejudice upon the part of the jury. The jury are and ought to be allowed great latitude in assessing damages in actions of this character. They should

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award liberal damages in full compensation for the injuries plaintiff received. If the amount of the verdict in this case was not so great as to clearly indicate passion and prejudice upon the part of the jury, we should not disturb it; but it is not the province of courts to enforce the arbitrary edicts of juries, when it is apparent that their verdicts have been influenced by their passions and prejudices rather than by the law and the facts.

Upon the ground that the damages are excessive, the judgment must be reversed and cause remanded for a new trial.

BEATTY, J., concurring:

I concur in the conclusion of the Chief Justice that the judgment in this case must be reversed upon the ground that excessive damages were awarded. But as my conclusion depends upon reasons which are, to some extent, different from those which he has set forth in his opinion, I have thought proper to state, very briefly, my own views of the case.

Upon the first point discussed, I concur in the opinion that the motion to transfer the cause to the United States court was not supported by a sufficient affidavit, and that it was properly overruled for that reason. I doubt, however, if the course suggested as the proper one to have been pursued would have brought the corporation defendant within the terms of the act of congress upon which it relied. That a corporation may, in some manner, avail itself of the provisions of that law has been assumed, without being expressly decided, by the supreme court of the United States (19 Wall. 214), and that case is probably binding authority on the state courts. But how a corporation can comply with the conditions of the law is something that has never been pointed out to my satisfaction. If I believed, as was held in the case just referred to, that the law, being of a remedial nature, ought to be liberally construed, I could see how, by the aid of a very liberal construction, its benefits might be extended to a corporation. But I think the opinion generally expressed by the state courts, that its op-

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eration should not be aided by construction, is the correct one. On its face the law is manifestly unjust in its provisions, and gratuitously unjust. Judging by my own experience, I venture to say that if the suffrages of the *nisi prius* judges in the different states could be collected, they would declare, with few dissenting voices, that the operation of the law is odiously unfair and oppressive. If such is the case, as I believe it to be, the law certainly deserves no favor from a court of justice, and so far from extending its operation by construction, it should be restricted within the narrowest possible limits. So restricted, it does not apply to corporations. It is true there is no good reason why, if an unfair advantage was to be given to a class of litigants, it should not have been given to corporations as well as to natural persons. But, on the other hand, it is at least equally true that if the terms upon which that unfair advantage can alone be enjoyed are such that a corporation cannot comply with them, no court of justice is called upon to stretch the provisions of the law in order to make it include corporations. It is to be hoped, if this question is ever fairly presented in the supreme court of the United States, the rule of strict construction will be adopted there, and the assumption that corporations stand upon the same footing as natural persons, with respect to this law, repudiated. In the meantime the state courts may have to submit to an ill-advised construction of the law, but in doing so they should not fail to protest against it. This preliminary question disposed of, the case upon its merits appears to me to be an extremely simple one. The plaintiff claims damages for being forcibly ejected from the defendant's cars. The defendant, by its answer, admits that he was so ejected, and justifies the act upon the ground that he had not paid for the ticket which he offered to the conductor. This, in my opinion, relieves the case of one of the questions discussed by the chief justice, viz.: whether the master is responsible for the willful acts of the servant. For there is no pretense that the conductor was actuated by any *express* malice in ejecting the plaintiff, or that he used any unnecessary force, or was guilty of any wanton outrage

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to his feelings. He simply did what he deemed to be his duty to his employers, and they have avowed and ratified the act, making it their own and assuming all the responsibility.

The only question, therefore, which the jury had to decide, in order to determine whether the plaintiff was entitled to recover, was this: Did he or did he not pay for his ticket? If he did he was entitled to a verdict. If he did not the defendant was entitled to a verdict. Upon this issue the jury, under proper instructions, found for the plaintiff, and there was abundant testimony to sustain such finding. The only remaining question was as to the measure of damages, and, in my opinion, this question also was settled by the pleadings. It seems to be well settled, that for any willful trespass to the person, the injured party may recover what are called exemplary or vindictive damages. The forcible expulsion of a passenger from a public conveyance when he is rightfully there, necessarily involves a trespass to the person, (in this case, it involved an assault and battery,) and it is a wrong which is inevitably accompanied with more or less of outrage and insult. No matter how mildly a conductor may behave—no matter how honestly he may be mistaken, a passenger cannot be forcibly thrust out of a car where he has a right to be, without being insulted and outraged in his feelings. And if there is no excuse for the act, except the mistake of the carrier, and that mistake is solely due to the carrier's negligence, it will be the same as if there was no excuse at all, and the law will imply that the act was malicious. So in this case, if the plaintiff did pay for his ticket, as the jury have found that he did, the mistake of the defendant cannot be pleaded as an excuse for his expulsion from the cars, and he was entitled to vindictive damages if he was entitled to any damages at all. That vindictive damages include compensation for the outrage to the feelings is well settled by the authorities, and is not opposed by the case of *Johnson v. Wells, Fargo & Co.*, in which this court went no further than to hold that mental pain, as distinct from bodily pain, is not the subject of compensation in a case where the injury is the result of negligence.

Opinion of Beatty, J., concurring.

This, as I have endeavored to show, is not a case of negligence, but of willful injury, and the correctness of the decision in *Johnson v. Wells, Fargo & Co.*, may be conceded without any impeachment of the rulings of the district court upon the instructions relating to the rule of damages in this case.

As to the question, whether a jury in awarding vindictive damages can go beyond a full compensation to the plaintiff for his pecuniary loss, and bodily and mental suffering, and add a further sum, by way of punishment to the defendant, for the sake of example, I think the weight of reason and the best considered cases are in favor of restricting the award to compensation to the plaintiff. Of course, the amount of compensation to which he will be entitled will depend, in every case, upon the circumstances of the injury, and in case of gross and wanton outrage, heavy damages would be allowed, which, while they would go to the plaintiff as a compensation, would operate incidentally as a severe punishment to the defendant. In this sense, and in this sense only, in my opinion, is it proper to say that a defendant may be punished by vindictive damages.

It is for these reasons that I concur in the opinion that the amount of damages awarded in this case evinces passion and prejudice on the part of the jury. If the injury complained of had been attended by any special circumstances of wanton injury, five thousand dollars might not have been an extravagant verdict; but considering the facts proved, it certainly was excessive.

Earll, J., having been of counsel in the court below, did not participate in the foregoing decision.

Statement of Facts.

[No. 798.]

11 377
12 280

KATE A. TWIST, RESPONDENT, v. THOMAS E. KELLY,
ET AL., APPELLANTS.

WHEN OBJECTIONS TO STATEMENT ON MOTION FOR NEW TRIAL MUST BE MADE IN THE COURT BELOW.—Where an objection is made to the consideration of an appeal from an order overruling a motion for new trial upon the ground that it does not appear from the transcript that the statement on motion for new trial was filed in time: *Held*, that this court will not notice such an objection unless the transcript shows that it was made in the district court.

DELIVERY AND CHANGE OF POSSESSION OF PERSONAL PROPERTY.—*Held*, upon the authority of *Gray v. Sullivan* (10 Nev. 416), that the evidence in this case was sufficient to sustain the finding of immediate delivery and actual and continued change of possession.

APPEAL from the District Court of the First Judicial District, Storey county.

This was an action brought by plaintiff to recover the sum of three thousand dollars damages, alleged to have been sustained by plaintiff by the unlawful acts of the defendants in seizing upon certain personal property belonging to the plaintiff. The defendant, Kelly, as sheriff of Storey county, justified the seizure by virtue of a certain writ of attachment to him delivered in the suit of *A. Louck v. Wm. Hoffman*, in the district court of said county. The attachment was levied upon the personal property in the United States restaurant.

The testimony offered upon the part of plaintiff tended to show that the plaintiff, Twist, loaned to Hoffman \$1,000 in July, 1875, and another \$1,000 in August 1875, that on the fifth day of November, 1875, Hoffman executed and delivered to plaintiff an agreement to convey to her, in consideration of the said sum of \$2,000, all the "fixtures, furniture, provisions and other articles" in the United States restaurant, upon demand, unless the sum of \$2,000 was paid; that on the eighth day of December, 1875, the said Hoffman executed and delivered to plaintiff a bill of sale of all the property in the restaurant, and plaintiff then endorsed upon the note of \$2,000: "Paid in full, Dec. 8, 1875"; that the sale was made about one o'clock P. M. of said day; that the plaintiff then,

Argument for Respondent.

in person, took possession of the personal property in the restaurant, and remained there until after six o'clock in the evening, giving instructions to the clerk and directing the steward and waiters in relation to the business of the restaurant; that Hoffman was not in the restaurant after the sale was made; that the plaintiff was present and in possession when the sheriff levied upon the property; that meats were bought and charged to the plaintiff, Twist; that plaintiff employed as book-keeper and steward the same persons that had been acting for Hoffman; that she assigned as a reason for such employment the fact that many boarders who worked at night left their buckets, and they were employed because they were acquainted with the business of the restaurant.

On the ninth day of December, 1875, a notice was published in the Enterprise that plaintiff had purchased the property. A notice was served upon the sheriff on the ninth day of December, by the plaintiff, claiming to be the owner of the property and demanding its delivery to her. The property was attached by the sheriff about six o'clock P. M.

The jury found a verdict in favor of plaintiff for \$2665 19.

J. R. Kittrell and T. W. W. Davies, for Appellants.

Branson & Stewart and J. A. Stephens, for Respondent.

I. The order of the judge, attempting to extend the time in which to serve statement, or for motion for new trial, should be stricken from the statement on motion for new trial. An appeal from the judgment only brings up the judgment roll. (Comp. Laws, sec. 1266.) As to the record which comes to this court, an appeal from order, on motion for new trial, see C. L. sec. 1258. If the appellant wishes any fact to appear of record other than that which is provided for in the sections above referred to, he must resort to his statement, as provided for in section 1393. Appellants might have moved to correct the record by having a proper certificate that the order extending the time was used on the motion. (*Gregory v. Frothingham*, 1 Nev. 253; *Wetherby v. Carroll*, 33 Cal. 549; *De Johnson v. Sepulveda*,

5 Id. 149; *People v. Honshell*, 10 Id. 83; *Freeborn v. Glazer*, 10 Id. 337; *Stone v. Stone*, 17 Id. 513; Comp. Laws, secs. 1393, 1401.)

II. Nothing is presumed in favor of the act of the judge, and for these reasons: the order, if a part of the record, is void, and cuts no figure in the case. The record stands as if no order had been made. (*Keller v. Chapman*, 34 Cal. 640.) If it is not a statement at all such as the statute contemplates, the objection to its use, as such, can be made in this court in the first instance. (*McWilliams v. Herschman*, 5 Nev. 263.) Statement cannot be stricken out on motion. It is error to do so. If it is not filed in time, it is no statement at all, and can be treated as such at any stage of the case. (*Culderwood v. Peyser*, 42 Cal. 111.)

III. The assignment of errors is too general. (*Squires v. Foorman*, 10 Cal. 298; *Ford v. Holton*, 5 Id. 319; *Brown v. Tolles*, 7 Id. 398; *People v. Jocelyn*, 29 Id. 562; *People v. Richmond*, 29 Id. 414; *Mahoney v. Van Winkle* 21 Id. 552; *Wixon v. B. R. & Auburn W. & M. Co.*, 24 Id. 367; *Walls v. Preston*, 25 Id. 59; *Millard v. Hathaway*, 27 Id. 119; *Crowther v. Rowlandson*, 27 Id. 376; *Barstow v. Newman*, 34 Id. 90; *Burnett v. Pacheco*, 27 Id. 408.)

IV. The facts of this case, as to the transfer and continuous change of possession of the property in question bring this case fully up to the requirements of the rules laid down in all the adjudged cases, and is a stronger case in this respect than either of the cases of *Gaudette v. Travis*, or *Gray v. Sullivan*, 10 Nev. 416; and complies fully with the rule laid down in *Doake v. Brubaker*, 1 Nev. 218; see also *Campbell v. Clarke*, 2 Nev. 243; *Samuels v. Gorham*, 5 Cal. 226; *Ford v. Chambers*, 28 Id. 13; *Grey v. Corey*, 48 Id. 208.

By the Court, BEATTY, J.:

This is one of those cases in which the vendee of personal property claims damages for its seizure under process against the vendor, and in which the principal question is whether or not the sale is void as to the creditors of the vendor, by reason of the want of immediate delivery or actual and continued change of possession. The plaintiff recovered judg-

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ment in the district court, and the defendants appeal from the judgment and the order of the court overruling their motion for a new trial. The respondent objects to the consideration of the appeal from the order, on the ground that it does not appear from the transcript that the statement on motion for new trial was filed in time. We think, however, that for more than one reason this objection cannot be sustained. In the first place, the statement contained in the transcript does not purport to be the original statement filed by the appellant; but, on the contrary, does purport to be the engrossed statement settled and certified by the district judge. The fact that it is certified by the judge to be a correct engrossed statement proves that the respondent must have proposed amendments to an original statement, and this was a waiver of any objection that the original statement was not filed in time. In the next place, the transcript contains a copy of an order made by the district judge before the time for filing the statement had expired, extending the time for filing it, and it appears to have been filed within the time so extended. The respondent, it is true, contends that this order is not properly a part of the record of the case, and must be ignored because it does not appear to have been used or referred to on the hearing in the court below, and because as a matter of fact it was not so used or referred to. On the same ground she objects to the consideration of a number of other papers which were on file in the district court at the time of the hearing, and are included in the transcript, all of which go to show that the original statement was filed in time. Without conceding the correctness of the position of counsel with respect to these papers—that they cannot be considered here because they were not *actually used* on the hearing of the motion in the district court, and are not indorsed with a certificate to that effect, we say, that if this position is correct, it proves conclusively that his objection to the statement was not made in time. If he had objected at the hearing of the motion in the district court to any consideration of the settled statement, on the ground that the original statement had not been filed in time, all the papers and documents

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on file bearing upon that question would have been used, and would then, on his own theory, have been properly included in the transcript. By failing to make the objection then, when it might have been met by the appropriate proofs, he must be held to have waived it. The case of *McWilliams v. Herschman* (5 Nev. 363), does not sustain him in his position that he may raise the objection to the statement in this court for the first time. We are quite satisfied with the correctness of the decision in that case, but it is not applicable to this. There the objection to the statement was that it contained no specification of the errors relied on by the moving party, and it was properly held that this intrinsic and incurable defect might be taken advantage of at any time. But the case is very different when the objection is based upon extrinsic matters which must be decided upon the evidence afforded by affidavits, and notices, and orders, and other documents on file in the district court. In one case there is nothing to be decided but a pure question of law, arising upon and fully presented by the record. In the other, the question to be decided is one of fact, which can be investigated nowhere so conveniently as in the district court, and which no one is so competent to decide, especially in case of a conflict of evidence, as the district judge. It ought, therefore, to be first raised in the district court, and if either party is dissatisfied with the decision of that court, the motion to disregard the statement and all the evidence adduced upon the hearing, can be made a part of the case on appeal, and can then be fairly reviewed. If there is no question as to the regularity of the steps taken in moving for a new trial, it is desirable on grounds of convenience, as well as economy, that the transcript should not be encumbered with papers which serve no other purpose than to show that the moving party has proceeded regularly; and we, therefore, take occasion to make the announcement that this court will not notice an objection to the statement on motion for new trial based upon the ground taken by the respondent in this case, unless the transcript shows that the objection has been made in the district court, and the mov-

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ing party thereby afforded an opportunity of supplying the necessary proofs, if they exist.

Upon the merits of the case presented by the statement on motion for new trial there is little to be said. The only point urged by the counsel for appellant in his argument before this court is, that the evidence did not show a sufficient delivery and change of possession of the goods in controversy to bind creditors of plaintiff's vendor. But taking the construction given by this court to the provisions of the statute of frauds relating to this subject in the case of *Gray v. Sullivan* (10 Nev. 416), it is clear that the evidence was sufficient to sustain a finding of immediate delivery and actual and continued change of possession, and upon the authority of that case the judgment must be affirmed.

Judgment and order affirmed.

[No. 796.]

A. GARRARD, RESPONDENT, v. J. B. GALLAGHER,
APPELLANT.

CONTESTED ELECTION.—The contest for members of the legislature can only be made in pursuance of the provisions of the statute, (2 Comp. L. 2555 to 2560, inclusive). The proceedings are special and under our statute the courts have no jurisdiction.

IDEM—SPECIAL REMEDY.—Where the statute gives a special remedy it must be followed, and the proceedings thereunder in contested election cases are substantially different from any common law remedy.

IDEM—COSTS.—In special proceedings costs will not be allowed except by legislative action. Nor will fees be given to the officers by the courts unless specially provided for by the statute.

IDEM—REMEDY WHERE FOUND.—As there is no provision made for the fees of officers or costs expended in a contest for members of the legislature, the remedy is left entirely to the discretion of the legislature.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts are stated in the opinion.

Whitman & Wood, for Appellant.

I. This contest is a special proceeding, and where its forum is a court proper, no further jurisdiction is obtained,

Argument for Respondent.

or power granted, than flows directly from the language of statute. (*Dorsey v. Barry*, 24 Cal. 449.) No costs were recovered at common law. They were first given by the statute of Gloucester, 6 Edw., 1 C. 1, which has been substantially adopted in the United States. (*State v. Kinni*, 41 N. H. 238; Bouvier's Law Dict., title costs, p. 370; Bacon's Abr., Vol. 2, title costs.)

II. When costs are allowed by the statute they only follow a judgment in favor of a party. It would be necessary as a ground of recovery even under a statutory right to costs, to aver and show a favorable judgment. There is no necessity to bring a suit for costs, as there is a very plain and speedy way to collect costs, viz., to issue execution therefor, and the failure so to do in this matter shows the weakness of its foundation. The truth is, the contest is a public matter. (*Minor v. Kidder*, 43 Cal. 229.)

T. W. Davies and D. J. Lewis, for Respondent.

1. The contest of plaintiff's election was a special proceeding in the nature of an action *inter partes*, instituted by the defendant in a private capacity for his own benefit, and upon his failure he becomes responsible for costs. (*Searcy v. Grow*, 15 Cal. 117 *et seq.*; *People v. Holden*, 28 Cal. 123.)

II. The mere fact that the legislative department has judicial authority to judge of the election and qualifications of its own members, does not oust the jurisdiction of the courts to hear and determine criminal charges, relating to false returns, tampering with ballots and returns, purchasing votes, illegal voting, etc. (2 Comp. Laws, 2588 to 2595, inclusive; Const. Nev., art. 4, sec. 10.) Then why should such jurisdiction to hear and determine an *action on the case* for a wrongful and groundless contest, instituted, perhaps, through malice, by a defeated candidate, be ousted? The legislature has no power to punish for such offenses; its functions are to enact laws, not to execute them. An attempt to hear and determine criminal charges, actions in tort, or on contract, would be an unwarrantable usurpation of judicial authority. (Const. Nev., art. 3, sec. 1.) The legislature has no power to hear and determine or to

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provide for offenses and misdemeanors (except for contempt of itself); its functions are to enact laws, not to execute them. (Const. Nev., art. 4, sec. 1, *ubi supra*.)

III. Where a case is tried in the usual manner, between a petitioner claiming his seat and the sitting member, the parties carry on the contest, but neither of them recover any costs against the other. (Cush. Parl. Law, 77, sec. 212.) But this case does not come within the rule, for the reason that the contestants abandoned the contest.

IV. Where the investigation into the merits of an election, or the rights of a member to his seat, is set on foot by the assembly itself, and not at the solicitation of any claimant of the seat, the assembly either defrays the expense out of its contingent fund (if it has one), or takes measures to obtain the passage of a law for that purpose. (Cush. Parl. Law, 77, sec. 212.)

In the case under consideration, the investigation into the merits of the election, or the rights of the member to his seat, was not set on foot by the senate, nor were the costs incurred under the direction of the senate, nor in proceedings had of its own motion before it.

V. The contestant takes away from the respondent his right to look to the senate to be reimbursed for the sums which he is caused to pay as witness fees and mileage, and for fees of officers, in the matter of defending in said contest (Cush. Parl. Law, 77, sec. 212), by instituting the contest in a private capacity in his own name and for his own benefit (*People v. Holden*, 28 Cal. 123); also, by his failure to prosecute the contest before the senate.

The fees and mileage of sheriff, clerk, justices of the peace and witnesses are payable in advance if demanded, and a failure to so demand such fees, etc., if such failure occurred, does not work a forfeiture of such fees and mileage on the part of such officers or witnesses. (Comp. L., 2735, 2737, 2739, 2742, 2746, 2753, 2548.) The assignee of such demands acquires, by the assignments properly made, the same rights in respect to said demands that was vested in the assignor.

By the Court, HAWLEY, C. J.:

At the general election in 1874, the respondent was elected to the office of state senator in Esmeralda county. The appellant, pursuant to the provisions of section 52 of the act concerning elections (2 Comp. L. 2555), filed with the clerk of said county a statement contesting the election of respondent. During the session of the legislature, the state senate indefinitely postponed the whole subject-matter relating to said contest. (Journal of the Senate, 1875, 54.) This action is brought to recover the costs expended by respondent in defending said contest and for certain sums of money alleged to be due certain officers who performed service therein at the request of the appellant, their claims having been assigned to respondent.

The first count in the complaint is for the costs alleged to have been expended by respondent amounting to \$223.75. The other counts are for the claims assigned to plaintiff (respondent herein) amounting to \$103.

The appellant demurred to the first count of the complaint upon the ground that it "does not state facts sufficient to constitute a cause of action." The demurrer was overruled. Appellant then offered to allow judgment for \$103, the amount of the assigned claims, which was declined by respondent. The appellant refused to file an answer, and judgment was entered, by default, in favor of respondent for the full amount claimed, viz.: \$336.75. This appeal is from the judgment.

The assignments of error are as follows: "First. Error in law in the overruling of defendant's demurrer. Second. Error in law in the allowance by the court of any other or greater amount * * * than defendant had offered to allow judgment for."

From this statement it will be observed that we are only called upon to determine whether the respondent is entitled to recover the amount included in the first count of the complaint. The contest for members of the legislature can only be made in pursuance of the provisions of the statute concerning elections. (2 Comp. L., 2555-2560, inclusive.)

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The proceedings are special in their character. In such contests, under our statute, the courts have no jurisdiction. It is a well-settled rule of law that where the statute gives a special remedy it must be followed, and the proceedings thereunder, in contested election cases, are substantially different from any common law remedy. (*Dorsey v. Barry*, 24 Cal. 449; *Casgrave v. Howland*, 24 Cal. 457; *Keller v. Chapman*, 34 Cal. 635; *French v. Lighty*, 9 Ind. 475; *Knox v. Fesler*, 17 Ind. 254; *State ex rel. Grisell v. Marlow*, 15 Ohio St. 114; *Peck v. Weddell*, 17 Ohio St. 271; *O'Docherty v. Archer*, 9 Tex. 295; *Wright v. Fawcett*, 42 Tex. 203; *Rogers v. Johns*, 42 Tex. 339; *Commonwealth ex rel. McCurdy v. Leech*, 44 Penn. St. 332; *Selleck v. Common Council of South Norwalk*, 40 Conn. 359.) In special proceedings costs will not be allowed, except by legislative action. (*State v. Kinne*, 41 N. H. 238; *Meller v. Easton and Amboy Railroad Co.*, 37 N. J. L. 223.) Nor will fees be given to the officers, by the courts, unless specially provided for by the statute. (*Town of Carlyle v. Sharp*, 51 Ill. 71; *Crittenden County v. Crump*, 25 Ark. 235.)

It is expressly provided by section 45 that in a contest in the district court in relation to any county office: "The clerk, sheriff and witnesses, shall receive, respectively, the same fees from the party against whom the judgment is given as are allowed for similar services in the district court." (2 Comp. L. 2548.) And where such contests are made in the courts it has been held that a citizen by instituting a suit becomes a party, and is responsible for costs if he fails. (*Searcy v. Grow*, 15 Cal. 122.) But there is no provision made for the fees of any officer or witnesses, or costs expended, in a contest for members of the legislature. In such cases the remedy of the parties, under the statutes of this state, is left entirely to the discretion of the legislature, and to that tribunal, instead of the courts, the respondent, if he has been damaged, must apply for relief.

The judgment appealed from is reversed, and the district court directed to enter a judgment in favor of respondent for one hundred and three dollars, without costs; and also

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a judgment in favor of appellant for his costs of suit subsequent to his offer to allow judgment, including the costs of this appeal.

[No. 755.]

ALEXANDER LEPORT, RESPONDENT, v. EDWARD D. SWEENEY, APPELLANT.

IRRELEVANT TESTIMONY—WHEN SHOULD BE STRICKEN OUT.—Where no objection is made to any question asked a witness, if the answer is not responsive to the question or not relevant to the issues presented, the opposing party should move to strike it out.

IDEM—TESTIMONY NOT PREJUDICIAL.—*Held*, that under the facts recited in the opinion, the defendant was not prejudiced by the answer of the witness that he cut "all the wood on the land that would roll into the cañon," as under the findings this question was wholly immaterial.

INSUFFICIENCY OF EVIDENCE TO SUPPORT THE FINDINGS.—Where it appears to this court that there is as much evidence to support the findings in every particular as there is to oppose the findings in any particular: *Held*, that this court will not disturb the judgment of the lower court.

APPEAL from the District Court of the Second Judicial District, Ormsby county.

The facts are sufficiently stated in the opinion.

R. M. Clarke, for Appellant.

Ellis & King, for Respondent.

By the Court, **HAWLEY, C. J. :**

This is an action to recover a sum of money alleged to be due plaintiff upon a written agreement executed by the plaintiff and one F. Marcoal as parties of the first part (the interest of Marcoal having been assigned to plaintiff), and E. D. Sweeney, defendant, as party of the second part, wherein the parties of the first part agreed, among other things, "to cut all the wood" on a certain tract of land belonging to the defendant, and "not to cull or pick the timber on said land, but to cut the timber clean as they go, and to make into cord-wood all the standing and fallen timber suitable for merchantable wood;" also, to recover certain other small amounts for goods, wares and merchandise sold and

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delivered, and for money loaned and advanced to defendant, etc., in all amounting to the sum of \$4324.59. The wood, when cut, was to be placed in Big Bend Cañon so that it could be conveniently loaded upon wagons. The defendant, among other things, in said contract, "agrees to pay the said first parties the sum of four dollars and twenty-five cents (\$4.25) for each and every cord of good merchantable cord-wood," and to make the payments at certain specified times, as the wood is cut and delivered.

In his answer, the defendant denies that the parties of the first part complied with the covenants and conditions of said agreement on their part to be performed, and, among other things, alleged that said parties "failed and neglected to cut and split all the wood agreed in said contract to be cut and split by them on the lands mentioned in said contract; and that they cut and split only the timber that was easiest of access, and only such as was easiest to be made into cord-wood; and that there is now standing on the ground timber agreed to be cut in said contract, suitable and sufficient to make seven hundred (700) cords of good merchantable cord-wood, to the damage of "defendant in the sum of two thousand dollars," and prays judgment against plaintiff for the sum of \$1960.00, and costs of suit. The case was tried before a referee, who found a judgment in favor of plaintiff for the sum of \$3575.39 with costs of suit. The defendant moved the district court to set aside the report of the referee, and for a new trial. This motion was denied. Defendant appeals from the judgment and from the order denying a new trial. There is but one point in the record that is excepted to and assigned as an error of law. During the trial, the plaintiff testified, that he cut "all the wood on the land that would roll into the cañon, and what is left would not roll in." This was objected to by the defendant on the ground that the written contract specified what wood was to be cut. No objection was made to any question asked by plaintiff's counsel; and if this testimony was not responsive to any questions, or was not relevant to the issues presented, the defendant should have moved to strike it out. But it is evident that

Points decided.

defendant was not, and could not have been, prejudiced by this answer.

The referee in one of his findings states: "That there is still some timber standing upon the tract of land described in said contract that has not been made into wood by the plaintiff, but that the plaintiff is not entitled to pay to the defendant any damages for not converting the same into cordwood for the reason that the defendant failed to comply with his part of the contract in not making the payments as he agreed to. Whether the timber left standing would have rolled into the cañon, or not, was, in view of this finding, supported as it is by the testimony, wholly immaterial. The only other question to be considered, is whether the evidence is sufficient to justify the findings and the judgment. The defendant specifies several particulars wherein he claims that the evidence is insufficient and upon which he relies for a reversal of this case. From the testimony, considering it in the most favorable light for the defendant, we think there is at least as much evidence upon the part of the plaintiff to support the findings in every particular as there is upon the part of the defendant to oppose the findings in any particular. In such a case this court will not interfere with the judgment of the lower court.

The judgment of the district court is affirmed.

[No. 817.]

JOSEPH DONDERO, APPELLANT, v. HENRY VANSICKLE, RESPONDENT.

PARTITION OF LANDS HOW MADE.—The district court can order a partition to be made, but it cannot itself make the partition except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition.

IDEM.—When the court decides in favor of a partition being made, it should appoint referees and direct them to divide and mark out the land, including the improvements into parcels of equal *value*, instead of making the division into parcels of equal *area*.

SEVERANCE OF IMPROVEMENTS.—A severance and removal of improvements, which are a part of the realty, from one parcel of the land to another in order to equalize their values, is not authorized by the statute, and would generally be injurious to the interests of the co-tenants.

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IDEM.—If the land cannot be divided into parcels of convenient shape and situation without throwing the valuable improvements into one tract, then, unless the value of the land in the other tract is greater than the one on which the improvements are situated, it should be increased in area until it is equal, quantity and quality considered, to the remaining tract, with the improvements included.

IDEM—PERSONAL PROPERTY.—A decree ordering a partition of certain personal property, not mentioned in the pleadings is clearly erroneous.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

Ellis & King, for Appellant.

I. The interlocutory decree is made without authority, and in excess of the jurisdiction of the court. Sections 277 to 280 of the civil practice act outline the course of procedure fully and distinctly, where partition and not a sale is ordered. The decree strips the referees of their judicial functions and makes them the unreasoning puppets of the court. (*Brown v. Bulkely*, 11 Cush. 168.)

The reasoning addressed to the court, that because it was competent in the district court to set aside any report of the referee, that, therefore, it was competent in the court to do the work of the referees, if followed to its legitimate conclusion, would establish the proposition that because this court can reverse, affirm, or modify a judgment of a district court, that it might therefore try the same cause in the first instance.

The question as to how the land could be divided, that is as to where the lines should run and area to be apportioned or partitioned to each, was not an issue in the case, and therefore neither party was called upon to meet it, and this court will not assume that any evidence was given upon this point. (Freeman on Co-tenancy and Partition, secs. 518 to 522.)

II. The preliminary decree is erroneous in this, that it provides for the removal of certain buildings from one part of the land to another part. It is no more in the power of the court or referees to make this order or decree, than it is to order the same buildings razed or destroyed by fire.

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III. The order is erroneous in this, that it acts upon and decrees the partition of certain personal property; which property is neither mentioned in any of the pleadings in the cause, nor within the purview of the statute under which the proceedings are taken, which is applicable alone to realty.

Thomas H. Wells, for Respondent.

I. Unless there is error apparent on the face of the interlocutory decree, both must be affirmed, as no motion was made for a new trial, and no statement or assignment of errors is made in the case. (See Pr. Act, secs. 330 to 337.)

II. If the court below misconstrued the provisions of the statute in making the order as to how the land should be divided, yet as no wrong to appellant is shown, or even asserted, and as re-partition would, presumably result as in the first instance, the court should not reverse the case.

A judgment in a civil cause will not be reversed simply because of technical error, if no prejudice be shown, nor right be infringed nor damage suffered.

In support of these views counsel cited the following authorities: *Seale v. Sota*, 35 Cal. 102; *Hastings v. Cunningham*, 35 Cal. 549; *Regan v. McMahon*, 43 Cal. 625.

By the Court, BEATTY, J.:

The parties to this action are co-tenants of a tract of land, and the suit is for a partition or sale of the common property. There was an interlocutory decree ordering a partition and appointing referees, and a final decree confirming their report of the partition made. The plaintiff appeals from both decrees.

The interlocutory decree, after reciting the finding of a jury (impaneled to try that issue), that partition can be made without prejudice to the owners, proceeds as follows: "Wherefore, in accordance with said verdict (the court having personally viewed the land and premises in controversy, and being satisfied therefrom and from the evidence in the cause given at the trial thereof, that said verdict is

correct, and that said land can be divided into two equally valuable tracts or parcels of land, without great prejudice to the owners thereof, and that none of the improvements, except outside fences, are of much value where they are), it is ordered, adjudged and decreed by the court that said land and premises in controversy, including the improvements on said land, can be divided into two equally valuable tracts or parcels of land and improvements without great prejudice to the owners thereof, the parties to this action, who each own one undivided half thereof, and that such partition ought to be, and shall be, made as follows: A direct line shall be run through said land from east to west and from west to east, in such manner that one-half of said land will lie and be north of said direct line, and the other half of said land south of said direct line, and said improvement on said land in controversy shall be divided and partitioned between said parcels of land and the owners thereof, and disposed of as follows: All fences standing on the exterior limits or boundary-lines of said land shall remain as they are; the yellow-colored dwelling-house, the milk-house or cellar, and the smaller of the two barns shall belong to and be removed by the party who shall in this partition get and own the north half or parcel of said land; the other dwelling-house, the out-houses, the largest of the two barns and the two corrals, which are on the south half or parcel of said land adjoining said barn on the north, shall go with said half or parcel of said land, and belong to the party who, in this partition, shall get and own said south half or parcel of said land in controversy," etc.

The appellant objects to this decree on the grounds: First, that the court exceeded its jurisdiction in making the partition itself instead of leaving it to be done by the referees; and, second, that even if the court had possessed the authority to make the partition, it proceeded in this instance upon an erroneous principle. Both points are well taken:

First. The court can order a partition to be made, but it cannot itself make the partition except in the indirect mode of confirming the report of the referees appointed for the

purpose of carrying out the order of partition. In this case it was settled by the pleadings that the land, including the improvements, was common property, belonging an undivided half to each party, and there seems to have been nothing for the court to decide preliminary to the interlocutory decree except the question whether the land should be partitioned between the parties or sold, and the proceeds divided. Having decided in favor of a partition, the court should have appointed referees, and directed them to divide and mark out the land, including the improvements, into two parcels of equal *value*, instead of making the division itself into two parcels of equal *area*.

Second. We are not aware of any precedent for requiring a severance and removal of improvements which are a part of the realty from one parcel of the land to another in order to equalize their values, and we think such a course would be generally, if not always, injurious to the interests of the co-tenants. If, in carrying out an order of partition in a case like this, the land cannot be divided into parcels of convenient shape and situation without throwing all, or the more valuable portion of the improvements into one tract, then, unless the value of the land in the other tract is greater than in the one on which the improvements are situated, it should be increased in area until it is equal, quantity and quality considered, to the remaining tract, with the improvements included. The statute (C. L. secs. 1328-9-40-41), and the authorities cited in the briefs of counsel, sustain these views, and upon the grounds stated, and for the additional reason that the decrees order a partition of certain personal property not mentioned in the pleadings, the interlocutory decree must be reversed, and as the final decree merely carries the interlocutory decree into effect, that must be reversed also.

It is ordered that the final decree be reversed, and the interlocutory decree also, in so far as it attempts to make a partition; and the cause is remanded for further proceedings in accordance with the views herein expressed.

Points decided.

[No. 805.]

**DAYTON GOLD AND SILVER MINING COMPANY,
PETITIONER, v. W. M. SEAWELL, DISTRICT JUDGE,
RESPONDENT.**

MINING AND MILLING ACT, CONSTITUTIONAL.—The act entitled, "An act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada," approved March 1, 1875 (Stat. 1875, 111), is constitutional.

EMINENT DOMAIN—PUBLIC USE.—When the legislative power of appropriation of the private property of a citizen is attempted to be exercised, the true test of its validity is, whether or not the use for which the property is to be appropriated is a "public use," within the meaning of these words as used in section 8, article 1, of the state constitution.

IDEM—DECISION OF LEGISLATURE NOT FINAL.—The declaration by the legislature that the purposes named in the act are "to be for the public use, and the right of eminent domain may be exercised therefor," is not conclusive upon the courts.

IDEM—DOUBTFUL CONSTRUCTION.—Although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words the construction given to them by the legislature ought to prevail.

WISDOM, POLICY, AND EXPEDIENCY OF THE LAW.—The legislative and executive departments of the state government are the sole judges of the wisdom, policy, justice or expediency of a law.

IDEM—POWER OF COURTS.—It is only in cases where the federal or state constitution limits the legislative power, and controls the will of the legislature by a paramount law, that courts are authorized to interfere and declare any legislative enactment void.

EMINENT DOMAIN—MEANING OF THE WORDS "PUBLIC USE."—In construing the meaning of the words "public use," as contained in the constitution of this state: *Held*, that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use.

IDEM—NECESSITY MUST EXIST.—The object for which private property is to be taken must not only be of great public benefit and for the paramount interests of the community, but the necessity must exist for the exercise of the right of eminent domain.

IDEM—WHEN THE POWER CAN BE EXERCISED.—The exercise of the power of eminent domain, even for uses confessedly for the public benefit, can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation to the citizen whose property is to be taken.

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Argument for Petitioner.

ORIGINAL application before the Supreme Court for a writ of peremptory mandamus.

The facts are stated in the opinion.

Whitman & Wood and C. J. Hillyer, for Petitioner.

I. The proceedings provided by the statute in question are identical with those held to be constitutional for the exercise of eminent domain and taxation in case of railroads in this state. (*Gibson v. Mason*, 5 Nev. 282; *Elliot v. V & T. R. R. Co.*, Id. 358; *V. & T. R. R. Co. v. Henry*, 8 Id. 165.) The method then being correct, the only question is as to the right. It is generally conceded that private property may not be taken by legislative action for private purposes; in fact, we have found but one authority to the contrary (*Harvey v. Thomas*, 10 Watts. 64); yet there is no reason for the rule, and we contend that the logical conclusion should be otherwise. And first, the constitution of the United States, so often called to the aid of the rule, has nothing to do with it. The fifth amendment to the federal constitution affects only federal legislation, and does not in any manner control that of the several states. (*Burron v. City of Baltimore*, 7 Pet. 273; *Fox v. State of Ohio*, 5 How. 449; *Withers v. Buckley*, 20 Id. 90.) So then we have only to consider the effect of the state constitution upon the proposition.

It is universally conceded that the constitution of a state, touching the legislative branch, is a limitation, not a grant of power; and that the legislative power is unlimited, save as so circumscribed. (*Gibson v. Mason*, 5 Nev. 283; *Leavenworth County v. Miller*, 7 Kan. 479.) If this be so, and there is no doubt upon that point, what shall prevent a legislature from taking private property for private use? Is it because it would be a violation of a natural right? Many legislative powers are such, and it is well held that it will not do to make this claim as against a written constitution. (*Butler v. Palmer*, 1 Hill, 324; *Bennett v. Boggs*, 1 Baldwin, 74; *Cochran v. Van Surlay*, 20 Wend. 381; *Calder v. Bull*, 3 Dallas, 386; *Gibson v. Mason*, 5 Nev. 295.)

Argument for Petitioner.

No implied prohibition can properly be drawn from the language of the constitution. It is admitted on all hands, that the gist of such language is in the prohibition to take private property for public use without *compensation*. So the only prohibition which can properly be inferred against taking private property for private use, if any may be, is that such property shall not be taken for such use without *compensation*. This we claim, against the great weight of authority to the contrary, is the only logical conclusion. So if the statute in question does take private property for private use, still, as it provides *compensation*, it is not unconstitutional. But it is not necessary for the purposes of this case to assume this extreme ground, though it be clearly correct. The statute declares in terms that the use for which the property is sought to be taken by petitioner is a public use, being that of mining. This should be conclusive (Potter's Dwarries on Statutes, 384, sec. 1); or if not absolutely conclusive, still of such great weight, that unless the use be clearly private, courts will not interfere with the legislative decision. (*United States v. Harris*, 1 Sumner, 42; *Beekman v. Sar. & Sch. R. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 Id. 137; *Matter of Townsend*, 30 N. Y. 174; *Bankhead v. Brown*, 25 Iowa, 546; *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 34 Id. 78; *Tilbot v. Hudson*, 16 Gray, 417; *Waterworks Co. v. Burkhart et al.*, 41 Ind. 379; *Kent's Com.*, vol. 2, 12th ed., 340, note.)

II. Within the meaning of the law of eminent domain, land is taken for the public use, whenever its taking is for the general public advantage. In addition to the authorities cited in the opinion, counsel refer to the following: (*Cooley on Taxation*, 77; *Ash v. Cummings*, 50 N. H. 591; *Jordan v. Woodward*, 40 Maine, 317; *Burgess v. Clark*, 13 Ired. 109; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Scudder v. Trustees Del. Falls Co.*, 1 Sant. N. J. 694; *Trabue v. Macklin*, 4 B. Monroe, 497; *Matter Central Park*, 63 Barb. 282; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *County Court v. Greenwood*, 58 Mo. 175; *Hildreth v. Lowell*, 11 Gray, 345; *Lumbard v. Stearns*, 4 Cnsh. 60; *Burden v. Stein*, 27 Ala. 104; *Reddull v. Bryan*, 14 Md. 444;

Argument for Respondent.

People v. Nearing, 27 N. Y. 306; *Anderson v. Kerns Drainage Co.*, 14 Ind. 199; *Miller v. Craig*, 3 Stock. N. J. 175; *Dingley v. Boston*, 100 Mass. 544; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Edwards v. Stonington Cemetery Ass.*, 20 Conn. 466; *Case of Pocopson*, 16 Penn St. 15; *Stevens v. Walker*, 15 La. An. 577; *In re Mt. Washington R. R. Co.*, 35 N. H. 134.) All of the purposes allowed in these different cases come properly under the rule quoted, for that they contributed in some degree to the public welfare, pleasure, necessity, or convenience. If these, or any of these, can properly be upheld, how much more the present case, involving the pursuit of mining, which directly affects all the people of Nevada; without which there would be no Nevada.

De Long & Belknap, Stonehill & Foote, and Thomas H. Wells, for Respondent.

I. The nature of the use to which the legislature may dedicate the property of a citizen, is not established by the name which they give to it, but is an inherent and inseparable quality or characteristic which cannot be changed however it be denominated. (*Bloodgood v. M. & H. R. R. Co.*, 18 Wend 62.) The right of a state government to take private property for private uses is not only contrary to the principles of Magna Charta and the very life of republican institutions, but if the maxim, "*expressio unius*," "*exclusio alterius*," is of any force, is contrary to the express provision of the state constitution. "It is prohibited to the government of the state even in its sovereign capacity to take private property except for public uses," consequently it is not in the power of the legislature to authorize private property to be taken for any other purpose. (*Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 63.)

II. It is established by principle and authority, that the provision in the constitution of this state, "that private property shall not be taken for public use without just compensation having been first made or secured," prohibits the legislature from taking private property for public uses, without the consent of the owner, even if compensation is made. "In no case can private property be taken, even

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where just compensation is paid except for public uses." (*Gibson v. Mason*, 5 Nev. 285; *Taylor v. Porter*, 4 Hill, 140; *Bankhead v. Brown*, 25 Iowa, 540; *Tyler v. Beacher*, 44 Vt. 648; *Bunn v. Bergen*, 2 Selden, 366; *Wilkinson v. Leland*, 2 Peters, 627; 2 Kent's Com. 340; Cooley's Const. Lim., 530-2; Sedgwick's Const. Law, 155.) It is only on the ground that the public have the right to the use of railroads, bridges, wharves, and the like, that private property can be condemned for those uses.

III. Statutes similar to the statute under which the petitioner claims the right to take the property of the defendant have been held unconstitutional in the following cases, viz.: *Gillan v. Hutchinson*, 16 Cal. 153; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. R. 344; *Tyler v. Beacher*, 44 Vermont, 648; see also dissenting opinion in *Newcomb v. Smith*, 2 Pinney, 140; *Raddell v. Bryan*, 14 Md. 144.

By the Court, HAWLEY, C. J.:

The petitioner applies for a writ of mandamus to compel the respondent, as district judge of the third judicial district, to forthwith proceed to hear a certain petition by it filed and presented under the provisions of the statute of this state entitled: "An act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada" (approved March 1, 1875), wherein it is, among other things, alleged that petitioner desires to acquire a strip of land in possession of, and claimed by, one James Waddell; that it is necessary for petitioner to obtain this land in order to transport the wood, lumber, timbers and other materials to enable it to conduct and carry on its business of mining; and petitioner therefore prays that respondent may be compelled to appoint commissions, whose duty it shall be to determine and assess the compensation to be paid for such land, and in all respects to proceed and make such orders as may be necessary, or proper, in pursuance of the provisions of said act. The respondent refused to act in the premises, because, in his judgment, the act in question is unconstitutional and void. He claims that the act is in direct violation of the provision of section

eight, article one, of the constitution, which declares that no person shall be “deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made or secured.”

The law, in our judgment, is well settled that, under this provision of the constitution, private property cannot be taken for a private use. The property of a citizen can only be taken by an act of the legislature for a public use, when a necessity exists therefor, and when compensation to the owner has first been made or secured. Whenever, therefore, the legislative power of appropriation of the private property of a citizen is attempted to be exercised, the true test of its validity is, whether or not, the use for which the property is to be appropriated is a “public use,” within the meaning of these words as used in the constitution.

The first section of the act in question declares that “the production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor.” (Stat. 1875, 111.)

It is contended by petitioner that this declaration of the legislature is conclusive upon the courts; in other words, that it is not within the legitimate province of the judiciary to control the judgment or decision of the legislature. There are some very respectable opinions which tend to support this view; but the decided weight of the authorities as well as reason is against it. As we construe the provision of the constitution, there is a limit upon the exercise of legislative power which prohibits that body from enacting any law which takes the property of one citizen and gives it to another for a private use, and if the legislature has, in the passage of this act, gone beyond this limitation it is the clear and positive duty of this court to declare the act unconstitutional and void. But in this connection it must, as we think, be admitted that although the action of the legislature is not final, its decision upon this point is to

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be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.

Before we discuss the main questions presented for our decision, it is proper to state that we have nothing to do with the wisdom, policy, justice, or expediency of the law. These are matters of which the legislative and executive departments of the state government are the sole judges; and even if we differed in opinion with them upon any of these grounds, we could not, for such reason, declare the act invalid. In the consideration of this case, these questions will be treated as settled by the passage and approval of the act. The remedy for unwise or oppressive legislation, when within constitutional limits, is by an appeal to the justice, intelligence, patriotism, and protection of the representatives of the people. It is only in cases where the federal, or state, constitution limits the legislative power, and controls the will of the legislature by a paramount law that courts are authorized to interfere and declare any legislative enactment void. These general principles are axiomatic in the jurisprudence of this country.

This brings us to the direct question: What is the meaning of the words "public use" as contained in the provision of our state constitution?" It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property is to be seized. In other words, that in favor of private rights the construction should be strict; that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community is a taking for a public use. No question has ever been submitted to the courts upon which there is a greater variety and con-

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dict of reasoning and results than that presented as to the meaning of the words "public use" as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it. Upon examining the authorities, we find that private property has been taken under a similar provision in the different state constitutions, for the purpose of making public highways, turnpike roads, and canals; of building railroads; of constructing wharves and basins; of establishing ferries; of draining swamps and marshes; of bringing water into cities and towns; of the establishment of water-power for manufacturing purposes; of laying out a public park; of constructing sewers; of erecting levees, to prevent inundation; of building lateral railroads to coal mines; of laying pipe for the transportation of oil from oil-wells to a railroad; of laying gas-pipes; of disposing of stagnant and offensive water, etc., etc.

It has frequently been decided that the public have an interest in the use of a railroad because it increases the facility for travel and transportation from one part of the country to another, and every citizen may use it by paying the usual rates of fare; the owners may also be prosecuted for any damage sustained by their refusal to transport individuals or their property upon the payment of the fare or freight. A turnpike is said to be for a public use because every man can, with his own horses and teams, or on foot, travel upon it for a fixed compensation, and the legislature may, from time to time, limit the amount of toll which the owners may take, and regulate the franchise under which their

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right to collect tolls exists. The same principle has been applied to many of the other enumerated cases. It is, however, evident that the act in question cannot be sustained upon any such reasoning. It can only be sustained, if at all, by adopting the theory advanced by petitioner's counsel. The issue is clearly presented and it ought to be fairly met. That the purposes mentioned in the act "are of vital necessity to the people of this state," cannot be denied; that mining is the paramount interest of the state is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition. Hence, it necessarily follows that if the position contended for by petitioner is correct, and I believe it is, then the act is constitutional and should be upheld. Although other and weaker reasons have more frequently been assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given.

Chancellor Walworth, in *Beekman v. Saratoga and Schenectady Railroad Co.*, advanced the doctrine that if the public interest could in any way be promoted by the taking of private property, that it must rest in the wisdom of the legislature to determine whether the benefit to the public would be of sufficient importance to render it expedient for them to exercise an interference with the private rights of individuals for that purpose, and said: "It is upon this principle that the legislature of several of the states have authorized the condemnation of the lands of individuals for mill-sites, where from the nature of the country such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads

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and canals. * * * In all such cases the object of the legislative grant of power, is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise." (3 Paige, 73.) The same views were again expressed by the learned chancellor, and adhered to by a majority of the court in *Bloodgood v. The Mohawk and Hudson Railroad Company*, 18 Wend. 13.

In *Gibson v. Mason*, Lewis, C. J., after declaring that property could only be taken for public uses, says: "A railroad must, then, whenever the right to take private property is given to it, * * * be held to be a public work, and for the public benefit." (5 Nev. 308.) And in this opinion the language of Chancellor Walworth, in the case of *Beekman v. The M. & S. R. R. Co.*, is quoted with approval. But the cases more directly in point, where the decisions are solely based upon this ground, are to be found in the states where a construction is given to what are known as the "mill-dam" or "flowage" acts. It is true that these acts in Massachusetts, owing to some of the provisions of the constitution of that state, could perhaps have been upheld under the existing colonial laws in force in that state, in relation to the rights of proprietors of land traversed by mill streams, at the time of the adoption of the state constitution; but the reasoning of the courts in sustaining the acts is generally, if not universally, based upon the grounds relied upon to sustain the validity of the statute of this state.

In *Boston and Roxbury Mill Corporation v. Newman*, wherein the validity of a special act which authorized the taking of private property of certain flat grounds to constitute a receiving basin, so as to enable the corporation to carry on its enterprise, was drawn in question; the court after tracing the history of the mill-dam acts back to their provincial origin, and declaring that there was no difference in principle between the special act and the mill-dam acts under the colonial laws, sustained the validity of the act, and in the course of the opinion say: "The principle is,

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that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale to satisfy the pressing want of the public." (12 Pick. 480.) The principle is better stated by Chief Justice Shaw, who delivered the opinion of the court in *Hazen v. Essex Company*. In this case the defendant was incorporated for the purpose of erecting a dam across the Merrimack river, and constructing one or more locks and canals, to remove obstructions in said river by falls and rapids, and to create a water power to be used for mechanical and manufacturing purposes; and it was contended that the act was void because it authorized the taking of property for a private use, and the main question, discussed in the opinion, was whether the use was public or private. The court say: "The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain." (12 Cush. 477.)

But still clearer and more direct is the language of Bigelow, C. J., speaking for the court in the subsequent case of *Talbot v. Hudson*. "In many cases, there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal, or a highway, it would clearly fall within the first-class; if it is transferred from one person to another, or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second-class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must

necessarily depend upon its own peculiar circumstances. In the present case, there can be no doubt that every owner of meadow land bordering on these rivers, will be directly benefited, to a greater or less extent, by the reduction of the height of the plaintiff's dam. The act is, therefore, in a certain sense, for a private use, and inures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are, therefore, to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found, then we are bound to suppose that the act was passed in order to effect it. * * * It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." (16 Gray, 423.)

The principle announced in these cases was approved

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and followed by a majority of the court in *Newcomb v. Smith* (2 Pin. (Wis.) 131.) It must, however, be admitted, that the value of this case as an authority is materially weakened by a very able dissenting opinion delivered by Larrabee, J., and concurred in by Chief Justice Stow, and the fact that in *Fisher v. Horicon Iron and Manufacturing Company* (10 Wis. 351), and other subsequent cases, the supreme court of that state question the correctness of the conclusion reached by the majority of the court in *Newcomb v. Smith*, that the "mill-dam" law was constitutional, but adhere to it solely upon the doctrine of *stare decisis*.

In Connecticut the doctrines advanced in the Massachusetts cases are fully supported. Especially is this true of the reasoning of the supreme court in *Olmstead v. Camp*, sustaining the validity of the flowage act of that state. It was there contended that the act manifestly authorized the taking of property for private use; that in order to sustain the law it must affirmatively appear that the public have an interest in the thing to be taken; that there must be a public right of control of the thing taken as property in which the state has an interest; that the thing taken is to be used by the public, and is taken that it may be so used. In discussing this question the court say: "One of the most common meanings of the word 'use' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' Public use may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit, so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use." (33 Conn. 546.) This decision directly declaring that the "term 'public use' is synonymous with public benefit or advantage" was concurred in by all the judges except Hinman, C. J., who dissented. In the subsequent case of *Todd v. Austin*, 34 Conn. 79, the court, notwithstanding the able arguments of learned counsel, who sought by numerous references to decided cases to show that the reasoning of the courts in sustaining the mill acts of Massachusetts did not apply in support of the flowage act of Connecticut,

sustained the decision in *Olmstead v. Camp*. In New Hampshire the same construction is given to a similar provision of the state constitution in the case of *The Great Falls Manufacturing Company v. Fernald*. In this case the petitioners were incorporated, under the authority of the legislature, for the purpose of carrying on the manufacture of cotton and woolen goods, they expended large sums of money in constructing dams and other works, and obtained a water power on Salmon Falls river sufficient for large and successful works. The defendant claimed title to a small and not valuable piece of land which was flowed by the dam of petitioners; he unreasonably refused to part with the land, and the business of petitioners was in danger of being interrupted and embarrassed, if not entirely defeated, by this obstinacy on the part of defendant. "The question is," say the court, "whether it is of such public advantage that this obstacle to the successful prosecution of the petitioners' business should be removed on payment of just compensation to the defendants, that the right would be taken for a public use, within the meaning of the term as used in the law on that subject, and in the constitution of this state? Or, to put the question in a general form, is it of such general public advantage that the streams and waters of this state should be brought into practical use for manufacturing purposes, that a private right standing in the way of an enterprise designed to accomplish extended and connected improvements in the water power of a large stream, * * is taken for a public use when taken to advance such an enterprise and remove an obstacle to its success?" (47 N. H. 456.) The question was answered in the affirmative and the act authorizing the property to be taken was sustained by a full bench.

The supreme court of New Jersey, in the case of *The Tide-Water Co. v. Coster*, held that the right of eminent domain could be employed for the purpose of reclaiming large tracts of tide-water land, and based its decision upon the ground that "it is the resulting general utility which gives such enterprises a kind of public aspect, and invests them with privileges which do not belong to mere private interests." (18 N. J. 521.) These views were approved

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and followed in the matter of the application for drainage of lands between *Lower Chatham and Little Falls*, in the counties of *Passaic, Essex and Morris*, 35 N. J. 497. The general principle upon which all of the foregoing cases were decided is sustained by the reasoning of the courts in the following additional cases: *In re Morris Canal and Bank. Co.*, 39 N. Y. 171; *Bloomfield and Rochester Nat. Gas Light Co. v. Richardson*, 63 Barb. 437; *Venard v. Cross*, 8 Kansas, 248; *Harding v. Funk*, 8 Id. 315; *Bankhead v. Brown*, 25 Iowa, 540.

The cases of *Hays v. Risher* (32 Penn.-Stat. 169), sustaining the constitutionality of the lateral railroad act, and *The West Vir. Trans. Co. v. The Volcanic Oil and Coal Co.*, (5 W. Va. 382), sustaining the constitutionality of an act authorizing the plaintiff to construct and maintain a line or lines of tubing for transporting petroleum or other oils through pipes of iron or other materials to any railroad, navigable stream, etc., are not in my judgment distinguishable in principle from the act under consideration; but the reasoning of the courts in support of the validity of said acts is to some extent based upon other grounds.

In Minnesota the supreme court, in *Miller v. Troost*, held that the act relating to "dams and mills" went to the extreme limit of legislative power, and after expressing the opinion that if such laws had not been sustained by the courts of other states, they would hesitate long before upholding the act, say: "The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional." (14 Minn. 369.)

In the light of these authorities, nearly all of which were decided prior to the adoption of our state constitution, I think it would be an unwarranted assumption upon our part to declare that the framers of the constitution did not intend to give to the term "public use" the meaning of public utility, benefit and advantage, as construed in the decisions we have quoted.

The reasons in favor of sustaining the act under consideration are certainly as strong as any that has been given in

support of the mill-dam, or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining, milling, smelting, or other reduction of ores," it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now it so happens, or, at least, is liable to happen, that individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass if not entirely defeat the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this state many of the advantages which other states possess; but by way of compensation to her citizens has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments

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unobstructed by the obstinate action of any individual or individuals.

But it is argued, that in sustaining this act upon the principles we have announced, there is no limitation to the exercise of legislative will in the appropriation of private property. After a thorough investigation of this question, I am of opinion that this argument is more specious than sound. It is an easy task to imagine occasional cases of individual hardship in the practical operation of any law, and this statement is certainly true of all laws passed in the exercise of the power of eminent domain, because it will always be difficult in following any rule to mark out with precision the boundary line beyond which the legislature cannot go. Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent. If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad.

One purpose is, so far as the legal rights of the citizen are concerned, as public as the other. The same principle is applicable to theaters. All citizens have the undoubted right, upon the payment of the price of admission, to attend all places of public amusement. Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of

individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor. The truth is, that there is a wide distinction between railroads and hotels, and, also, between the business of mining and that of conducting theaters. A railroad, to be successfully operated, must be constructed upon the most feasible and direct route; it cannot run around the land of every individual who refuses to dispose of his private property upon reasonable terms. In such cases the law interferes, and takes the private property of the citizen upon payment of a just compensation, in order to promote an interest of great public benefit to the community, which could not be successfully carried on without the exercise of this power of eminent domain. The same principle applies to the business of mining; but it cannot reasonably be applied to the building of hotels or theaters. In the building of hotels and theaters the location is not necessarily confined to any particular spot, and it is always within the reach of capital to make the proper selection, and never within the power of any individual, or individuals, however stubborn or unreasonable, to prevent the erection of such buildings. The object for which private property is to be taken must not only be of great public benefit and for the paramount interest of the community, but the necessity must exist for the exercise of the right of eminent domain.

The property of the citizen is sufficiently guarded by the constitution, and he is protected in its enjoyment and use, except in the extreme cases of necessity where it is liable to be taken for the purpose of advancing some great and paramount interest which tends to promote the general welfare and prosperity of the state; and when it is understood that the exercise of this power, even for uses confessedly for the public benefit, can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation

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to the citizen whose property is thus taken, none of the dangers of future legislation predicted by respondent's counsel, is at all likely to happen. But if in error in this respect, this court, as already stated, is powerless to furnish the remedy. The fact is, as was clearly stated by Justice Beatty, in *Ex parte Spinney* (10 Nev. 333), that the protection which the people of the state enjoy against unjust and absurd legislation, "is not derived from constitutional restrictions, but from the force of public opinion and the character of our representatives. This court has the power to keep the legislature within the terms and plain import of the constitution. To superintend the conscience and intelligence of legislatures, and see that they pay a due regard to considerations of justice and expediency in the enactment of laws, is the business of the people."

We are of opinion that the present law can be enforced by the courts so as to prevent its being used as an instrument of oppression to any one. But if, in its practical operations, it is found to be incompatible with a just preservation of the rights of individuals in private property, it will be the duty of the legislature to repeal the act, and to that tribunal instead of this must the argument of injustice be made. Whether we look at this act in the light of the interpretation which has been given to the term "public use" in the constitution of other states, to our own reasoning and construction of the language of the state constitution, or, to the character of the business and the natural production and resources of this state, we are irresistibly drawn to the conclusion that the act is constitutional and valid.

It is, therefore, ordered that the writ of peremptory mandamus be issued.

[No 781.]

ANNA J. GILSON, APPELLANT, v. JOHN BOSTON,
RESPONDENT.

RIGHTS OF REDEMPTIONER—LESSEE.—Plaintiff purchased from B. the right of redemption to certain land, and redeemed the same from the purchaser at a foreclosure sale. *Held*, that she is not entitled to the possession of the land against a lessee under a demise made subsequent to the mortgage.

IDEM.—After redeeming, plaintiff had the same estate in the land that B. had before the sale, and was as much bound by the lease as B. would have been.

LEASE.—WHEN IT NEED NOT BE IN WRITING.—A lease for a year need not be in writing, and the power to execute it need not be in writing. (1 C. L. 233.)

ACTUAL NOTICE.—PURCHASER IN GOOD FAITH.—Actual notice dispenses with constructive notice. A purchaser with actual notice is not a purchaser in good faith of the estate previously conveyed.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

T. W. W. Davies, for Appellant.

The plaintiff was entitled to the crops on the land not secured at the time the redemption time expired, as the defendant Boston went into possession after the foreclosure sale, and with full knowledge, actual and constructive, of the termination of the redemption time. (Comp. Laws of Nevada, vol. 1, sections 228-252-255. 1 Hilliard on Mortgage, pp. 180-182, and note c. par. 5, p. 184; par. 18, pp. 193-7; par. 33-34, pp. 207-208, and p. 214. Taylor's Landlord and Tenant, sec. 120; 2 Story Eq. sec. 1023, n.)

Robert M. Clarke, for Respondent.

By the Court, BEATTY, J.:

This is an action of ejectment, and the questions presented upon the appeal arise out of the following state of facts:

In December, 1872, Bollen, who was then the owner of the land in controversy, mortgaged it to Martens, and in November, 1873, leased it for four years to Lovejoy. In

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December, 1874, Martens foreclosed his mortgage, and on January 28, 1875, purchased the land at the foreclosure sale, acquiring all the estate Bollen had at the date of the mortgage. In January, 1875, and prior to the sale, Lovejoy assigned his lease to the defendant, Boston, who immediately took possession thereunder. Subsequently, the plaintiff, Anna Gilson, with notice either actual or constructive of all these facts, purchased Bollen's right of redemption, and before the expiration of the time for redemption redeemed the land from Martens, the purchaser at the foreclosure sale. She thereupon demanded possession of the land from Boston, who refused to surrender, and this action was commenced in September, 1875.

Upon a finding of the foregoing facts, among others, the district court gave judgment for the defendant, and subsequently overruled a motion for new trial. The plaintiff appeals from both the judgment and order, and in support of her appeal contends that on the 28th of July, 1875, when the time for redemption expired, she became entitled to all the estate in the land that Martens would have had if no redemption had been made, and, consequently, that she was entitled to the immediate possession against a lessee under a demise made subsequent to the mortgage. But in this position we think she is mistaken. As assignee of Bollen, and redeeming in his right, she stands in his shoes; and his position, as a redemptioner, is defined by the statute as follows: "If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he be restored to his estate." (Comp. L., end of sec. 1295.) So that the plaintiff, in this case, after redeeming had the same estate in the land that Bollen had before the sale; that is, she had the reversion after the expiration of Lovejoy's term, and was no more entitled to the possession, as against Lovejoy or his assignees, than Bollen would have been if there had never been a foreclosure or a sale.

But the appellant contends that Boston was not the assignee of Lovejoy, and that the evidence does not sustain that finding. The lease to Lovejoy contained a covenant

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that he would not underlet the premises without the *written* consent of Bollen; and it was not shown that he consented *in writing* to the assignment, though he did consent orally. Without undertaking to decide what was the effect of the failure to procure this consent in writing, we think everything that the appellant claims, or can claim as resulting therefrom, may be conceded without bettering her case. Suppose the effect of the assignment without Bollen's written consent to have been a forfeiture of all the rights of the lessee. If so, the forfeiture accrued to Bollen before the foreclosure sale, and he afterwards leased the premises to Boston for the year 1875, and received the rent. Appellant, by her own admission, had notice of this lease and of Boston's possession thereunder before she purchased Bollen's right to redeem; and when she redeemed, she was as much bound by the lease as Bollen would have been.

It is not necessary to notice particularly all the arguments of counsel for appellant, based upon the assumption that she acquired by her redemption all the estate that was mortgaged. They are all disposed of by saying that she got only the estate that Bollen had when he sold his right of redemption.

There is nothing in the objection to Tebbs' want of authority to execute the lease from Bollen to Boston for the year 1875. A lease for a year need not be in writing, and the power to execute it need not be in writing. (C. L., sec. 283.) Neither is there any force in the objections to the failure to acknowledge and record the assignment of Lovejoy's lease. If the appellant, with actual and constructive knowledge of the lease, had any right to notice of the assignment, she had actual notice, and actual notice dispenses with constructive notice. It is only subsequent purchasers *in good faith* against whom unrecorded conveyances are void; and a purchaser with actual notice is not a purchaser *in good faith* of the estate previously conveyed.

The judgment and order appealed from are affirmed.

Statement of Facts.

[No. 794.]

THE STATE OF NEVADA, RESPONDENT. v. GEORGE
O'CONNOR, APPELLANT.

11	416
13	24
13	387
13	394
13	514
15	37
15	364
16	215

11	416
25	470

INDICTMENT—TIME OF COMMISSION OF OFFENSE.—The indictment charges:

"That on the twenty-third day of February, A. D. 1876, or thereabouts, at the county of Storey, " " " without authority of law, and with malice aforethought, with a deadly weapon, to wit, a knife, the said George O'Connor then and there being armed, did, without authority of law and with malice aforethought, make an assault in and upon one John Winn, with intent to kill him, the said John Winn," etc.: *Held*, that the time when the offense was committed is alleged with sufficient certainty.

IDEM.—The words "and before the finding of this indictment," after the date alleged, though proper, need not necessarily be inserted in an indictment.

IDEM—STATEMENT OF OFFENSE CHARGED.—*Held*, that the indictment clearly charges an assault with a knife—a deadly weapon—with intent to kill.

MOTION IN ARREST OF JUDGMENT.—A motion in arrest of judgment can only be sustained upon the ground that the court has no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a public offense. (1 Comp. L., 1918.)

RES GESTÆ.—Remarks made in the presence of a party concerning his own conduct are often material facts when his conduct becomes the subject of investigation, and are admissible in evidence as a part of the *res gestæ*.

ASSAULT WITH INTENT TO KILL.—The statute of 1873 embraces the crime of an assault with intent to kill in all cases where the killing, if effected, would be unlawful.

INSTRUCTIONS—DRUNKENNESS OF DEFENDANT.—Upon reviewing the instructions given and refused by the court, relating to the question of defendant's intoxication: *Held*, that the instructions given on this point were more favorable to the defendant than those which were refused.

REFUSAL OF INSTRUCTIONS—WHEN NOT ERRONEOUS.—It is not error to refuse an instruction which has already been given in substance, and in terms as clear, full, and favorable to the defendant as those in which the court is asked to repeat it.

APPEAL from the District Court of the First Judicial District, Storey County.

The instructions refused by the court upon the question of drunkenness, referred to in the opinion, read as follows:

"If the jury find that the defendant, at the time of the assault, had, by drinking intoxicating liquors, made himself incapable mentally of entertaining the intent to kill, then

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he is not guilty, unless he had formed the intent to kill when mentally capable of entertaining it."

"The application of the rule that drunkenness is no excuse for crime to the case on hand would be that the drunkenness is no excuse for the assault, but if defendant is charged with a criminal intent accompanying the assault, this could not exist if he was too drunk to entertain it. The wrongful intent in drinking does not supply or aid the proof of an intent to kill."

The instructions given by the court upon this point, and referred to in the opinion of the court, read as follows:

"If the jury believe from the evidence that the condition of the prisoner, from intoxication, was such as to show that there was no motive or intention to kill the said John Winn, they may find the defendant guilty of a less offense embraced in that of the one charged in the indictment."

"In this case, the criminal intent is the essence of the crime, and in such a case the jury are to judge whether from intoxication, or other cause, there was a want of such criminal intent. The question is, did he know what he was about? If he did, and had the intent, he is guilty; if he did not, he is not guilty."

"The nature and essence of the crime charged depends upon the particular state and condition of the defendant's mind at the time of the assault, and drunkenness as a matter of fact, effecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury."

"In order to convict, the jury must find either that the defendant was in possession of his mental faculties, and entertained an intent to kill when the assault was made, or that he had formed this intent before he lost control of his faculties."

The other facts sufficiently appear in the opinion.

L. T. Cowie, for Appellant.

I. The court below erred in overruling the demurrer to the indictment, and the motion in arrest of judgment.

The formal part of the indictment is merely a conclusion of law, drawn from the facts stated in the body of the

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same. To compel a defendant to go to trial upon an indictment charging merely "an assault with intent to kill," without setting forth any of the acts constituting the offense, would and does necessitate his being prepared to disprove or rebut the commission by him of any or all acts towards the prosecuting witness which could possibly come within the offense charged. The defendant does not know how the State will attempt to sustain their charge; they may introduce evidence to prove that the shot at A. B. with a pistol or a gun, or that he attempted to stab A. B. with a knife or with a sword, or that, being a much more powerful man than A. B., he attempted and tried to kill A. B. with his hands, or otherwise, without the use of any deadly weapon. (*State v. Anderson*, 3 Nev. 254; *State v. Brannan, et al.*, 3 Id. 238; *State v. Rigg*, 10 Id. 288; 1 Wharton Crim. Law, secs. 284-285, note 1; 30 Cal. 214.)

II. The offense charged in this case is an attempt to commit a higher crime than the one charged, as shown by the definition of attempt as given by Bishop, in first volume Criminal Law, sec. 659.

III. In regard to the question of time, see Criminal Practice Act. (*State v. Brannan, et al.*, p. 240.)

IV. The court erred in overruling the objection to and the motion of the defendant to strike out the evidence of the witness Waddell, and in allowing the same to go to the jury. Hearsay testimony is inadmissible. The declarations of a third party are immaterial and irrelevant. It was not the best evidence. If any person made use of any language at that time and place it was the duty of the prosecution, if they desired to prove the fact as stated, to produce that person as a witness, and confront him with the defendant, so that the defendant might have some opportunity to disprove or rebut it. How did the person whom the witness heard make the remark know that the defendant had gone for a knife? Had not the defendant a right to have that person's name, have him produced in court, subject him to a cross-examination, test his veracity, and if necessary, introduce testimony to impeach him? Again, how was the defendant to discover that the witness was telling the truth

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or a falsehood, when he said that he heard somebody else say, etc.?

V. The court below erred in refusing to give the instruction asked by defendant, to the effect that "the jury must find the intent to kill under circumstances which, if death had ensued, would have made the killing murder; if they do not so find, they may find guilty of assault and battery or acquit." (Crim. Pr. Act, sec. 235; *State v. O'Flaherty*, 7 Nev. 157; 2 Whart. Crim. L., secs. 1279-1283; *Maher v. People*, 10 Mich. 212; *Roberts v. People*, 19 Mich. 415.)

VI. The court erred in refusing to give the instructions asked by defendant upon the question of drunkenness. (1 Bish. on Crim. L., sec. 408, 413; 1 Whar. Crim. L., secs. 41 to 44; *Roberts v. People*, 19 Mich. 401.)

J. R. Kittrell, Attorney-General, and Lindsay & Dickson, for Respondent.

I. The indictment substantially conforms to the form prescribed in the criminal practice act, and is sufficient. (1 vol. C. L., sec. 2352; *People v. Logan*, 1 Nev. 115; *People v. Swenson*, 48 Cal. 388.)

II. If the instruction in regard to intoxication or drunkenness be abstractly correct as propositions of law, still there is no testimony contained in the transcript tending to show that defendant, at the time of the commission of the offense, was either drunk or sober. The record should contain enough testimony to give point to the instructions. The court having refused to give these instructions, the presumption is, that they are not applicable to the case, and were properly refused. (*State v. Waterman*, 1 Nev. 543; *People v. Sanches*, 24 Cal. 17; *People v. Byrnes*, 30 Id. 206; *People v. Roberts*, 6 Id. 214.)

III. The last instruction asked by the defendant, and refused by the court, does not correctly state the law. The intent to kill need not be specifically proven. Where an unlawful act is proven to have been done by the accused, the law presumes it to have been intended; and the proof of justification or excuse lies on the defendant. (*People v. Harris*, 29 Cal. 678.) The question of intent is a matter of

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which the jury is the exclusive judge. They are to determine that question from the character of the assault, the character of the weapon, the manner of its use, and the circumstances attending the assault. Criminal intent is a fact for the jury, to be established, like any other fact, by proof positive, circumstantial, or presumptive. (1 Whar. C. L., secs. 631, 712; 8 Cal. 547.)

By the Court, BEATTY, J.:

The defendant was convicted of an assault with intent to kill, and appeals from the judgment. His first point is, that the district court erred in overruling his demurrer to the indictment. Omitting the title and other formal parts, the indictment reads as follows: "George O'Connor is accused, by the grand jury of the county of Storey, by this indictment, of the crime of an assault with intent to kill, committed as follows, to wit: That on the twenty-third day of February, A. D. 1876, or thereabouts, at the county of Storey and state of Nevada, without authority of law, and with malice aforethought, with a deadly weapon, to wit, a knife, the said George O'Connor then and there being armed, did, without authority of law, and with malice aforethought, make an assault in and upon one John Winn, with intent to kill him, the said John Winn. Contrary to the form," etc. The objections to this indictment, specified in the demurrer, are as follows: First. "That it is not direct or certain with regard to the date of the commission of the offense, nor is it direct or certain as to the crime or offense charged. It charges that an assault was committed by defendant upon one John Winn, and also charges, that said defendant was armed at the time with a deadly weapon, but it does not charge that the defendant used, or attempted to use, said weapon upon said John Winn. It, therefore, fails to charge, except by way of averring a conclusion of law, that any offense other than that of an assault simply, was committed." Second. "That it cannot be understood therefrom, that the offense was committed prior to the finding of said indictment." The second of these objections, and the first part of the first one, may be considered together. It is

conceded that the sufficiency of the indictment is to be tested by its conformity to the provisions of the criminal practice act, and both objections involve a construction of the same sections of that law.

The form of an indictment is prescribed by section 235, and so far as the allegation of the time when the offense was committed is concerned, has been literally followed in this case. Section 239 provides that "the precise time at which it was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding of the same, except when the time is a material ingredient of the offense." In view of these provisions of the statute, it is plain that the time when the offense was committed is alleged with all the certainty and definiteness that either the letter or the spirit of the law requires. But it is strenuously contended that, as this indictment was presented on the twenty-sixth of February, and must have been found before it was presented; and since the words "on the twenty-third day of February, A.D. 1876, or *thereabouts*," include, in their natural import, at least two or three days before and after the twenty-third, there is no certainty that the indictment was found after the offense was committed. It is insisted that, in order to make it conclusive on this point, it was necessary to have inserted, after the words above quoted, these additional words: "And before the finding of this indictment." We are aware that it is not an unusual practice to include these words by way of extra precaution, but we think it is entirely unnecessary to do so. No such words are used in the form prescribed by the statute, and there is nothing in any other provision of the statute requiring any amplification of the prescribed form in this particular. Section 241 provides that "words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning."

There is no peculiar legal meaning to the tenses of the verb and the words "did assault," in their usual acceptance in common language, describe a past transaction with just

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as much certainty as if they were qualified by the phrase, "and before the finding of this indictment." In regard to the second part of the first objection to the indictment, it is necessary only to say that it depends upon an inadmissible construction of the language used. It is manifest that the intention of the pleader was to charge an assault with a knife, and that is what any person of plain understanding would construe it to mean, but counsel for appellant contends that under a strict grammatical analysis, it means only this: that defendant being at the time armed with a knife, made an assault, but not necessarily with the knife. In order to reach this construction he reads the indictment as if the words, "with a deadly weapon, to wit: a knife, the said George O'Connor then and there being armed," were included in parentheses. But this cannot be, for if they were so divided from the balance of the sentence, the predicate "did assault," etc., would be left without any subject. Put the words "George O'Connor" in parentheses, and it is not alleged that anybody did assault; and the whole indictment becomes utterly meaningless. It cannot be denied that the language of the indictment is rather awkward and involved, but we think the criticism that would deprive it of any meaning whatever is rather too destructive. It is a more reasonable construction to simply reject the words "then and there being armed," as wholly unnecessary to its sense. This leaves an indictment clearly charging an assault with a knife—a deadly weapon—with intent to kill. That such an indictment is sufficient, see *State v. O'Flaherty*, 7 Nev. 157; *State v. Rigg*, 10 Nev. 288.

Second. The defendant also moved in arrest of judgment on the ground that this indictment charges two offenses: First, an assault; and, second, as a conclusion of law, an assault with intent to kill. We do not think the indictment is chargeable with this fault, but if it was, it would be no ground for a motion in arrest of judgment, which can only be sustained upon the ground that the court has no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a public offense. (See Statutes of 1875, page 119, sec. 8, and Comp. Laws, sec. 1918.)

Third. The bill of exceptions shows that during the progress of the trial one of the witnesses was allowed to give the following testimony against the objection of the defendant: "And the next thing I heard somebody saying, 'John, you had better get out of the way; he has gone for a knife.'" The grounds of the objection to this testimony, specified at the time, are that it is immaterial, irrelevant, and hearsay. The court overruled the objection, and refused to strike out the testimony, upon the ground that it appeared to be part of the *res gestæ*. From all that appears, the court was perfectly right in its ruling. If, as seems probable, the witness was describing the circumstances of the assault, and testified to this language having been used at the time of the assault, and in the presence and hearing of the defendant, it was not hearsay evidence of the fact that the assault was made with a knife, but was direct evidence of another fact that may have had very important bearings upon the attendant circumstances. Remarks made in the presence of a party concerning his own conduct are often material facts, when his conduct becomes the subject of investigation. And in this case it is not difficult to imagine a great many ways in which the exclamation testified to may have influenced or given character to the subsequent acts of the defendant and of the party assailed. It was therefore a part of the *res gestæ*, and, as such, was properly admitted.

Fourth. The court refused four of the instructions requested by the defendant, and this action is assigned as error. The first of these instructions was as follows: "To find the defendant guilty as indicted, the jury must find the intent to kill, under circumstances which, if death had ensued, would have made the killing murder; if they do not so find, they may find guilty of assault and battery, or acquit." This instruction does not present the law of the case, even if the appellant's interpretation of the statute were correct. But he is mistaken in supposing that the statute only embraces assaults with intent to kill, where the circumstances are such as would make the killing murder. By the act of 1861, a penalty was prescribed for assault with intent to commit *murder*. In 1873, the section con-

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taining this provision was amended by substituting "assault with intent to *kill*," showing clearly that the design of the legislature was to impose the prescribed penalty in all cases where the killing, if effected, would be unlawful. It may be true, as counsel contends, that this indictment charges an attempt to murder; but certainly that does not make it any the less a good indictment for an attempt to kill; and as the penalty is the same in all cases, it would have been worse than useless to ask the jury to make a special finding as to what the grade of the homicide would have been if the person assaulted had been killed.

The second and third instructions refused were to the effect that if the defendant, at the time of the assault, was so drunk as to be incapable of forming or entertaining an intent to kill, he could not be convicted as charged. It is a sufficient reason for sustaining the refusal of the court to give these instructions, that there is not a particle of evidence contained in the record going to show that the defendant was intoxicated at the time of the assault. It is true that the court, at the request of the defendant, gave other instructions, to the effect that if the defendant was found, on account of intoxication or other cause, not to have entertained an intent to kill, he could not be convicted of the crime charged. This does prove that there must have been *some* evidence of intoxication, but it does not prove that there was any evidence of such a degree of intoxication as would have rendered the defendant incapable of entertaining or forming an intent to kill.

Besides, the instructions which the court gave on this point were more favorable to the defendant than those which were refused. The jury were instructed that the intent—the state and condition of the defendant's mind—was the very essence of the crime charged, and that drunkenness, as a fact affecting such state or condition of mind, was a proper subject for their consideration; that if he had no intent to kill he could not be found guilty as charged. An instruction which tells a jury that they cannot convict, if, for any reason, they find that the defendant did not intend to kill, is certainly more favorable to him than one which

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tells them they cannot convict if, for some particular reason, they find he could not form such an intent. The former proposition includes the latter and much more, and the fact which it assumes—absence of intent—is more credible, and therefore more easily proved, than a total incapacity to form an intent. If this is true, the appellant has no ground of complaint; for it has been frequently decided in California, and assumed, if not expressly decided, in this state, that it is not error to refuse an instruction which has already been given in substance, and in terms as clear and full, and favorable to the defendant as those in which the court is asked to repeat it. In the case of the *State v. Bonds* (1 Nev. 35), it was decided that the refusal, in the presence of the jury, of an instruction manifestly proper and applicable to the case, was an error, which was not cured by the giving of another to the same effect but expressed in different language; because its refusal in the presence of the jury, without explanation, had a tendency to raise a presumption in their minds that it was not the law. In the case of the *State v. Ferguson*, (9 Nev. 118.) this court, referring to *State v. Bonds*, remarked in passing, but without deciding or having occasion to decide the point, that “If an instruction is refused because its substance has been given by the court, that fact should be stated and noted on the instruction, otherwise it might be such an error as to deprive the defendant of a substantial right.” It will be observed that the court in this case expressed itself very cautiously, to the effect that the unexplained refusal of an instruction might, under some circumstances, prejudice the defendant, notwithstanding its substance had been given already. And it is undoubtedly true that, in a case where the proceedings are as anomalous as they seem to have been on the trial of *Bonds*, a defendant might be prejudiced in the manner there pointed out. But no such proceedings are contemplated by the statute, and it is safe to say they are very unusual. It is provided by sections 387 and 388 of the criminal practice act (C. L. secs. 2011, 2012) that either party may present to the court any written charge and request it to be given, and the decision of the court

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must be made by endorsing its allowance or rejection upon each charge so presented. The usual and proper practice is in accordance with the plain import of these provisions. The instructions which either party wishes to have given are written out and presented to the court. The court endorses upon each one of them the word "allowed" or "refused" as the case may be, and signs his name under the endorsement. The instructions which are allowed are read to the jury, and are usually taken with them when they retire to consider of their verdict.

But the instructions which are refused are simply filed with the clerk and are never seen or heard read by the jury. In such case, it is obvious that the defendant is not prejudiced by a failure on the part of the court to explain that an instruction is refused only because it has been already given. Not knowing that the instruction has been refused the jury need no explanation of the reason why it has been refused. If the judge reads a correct instruction aloud to the jury and announces that it has been refused, without saying why, that might prejudice the case of the party which has asked it. But it does not appear that anything of the kind took place in this instance and certainly it cannot be presumed. There was no error therefore in the action of the court, and the appellant was in nowise prejudiced thereby. The notion that the failure to explain the reason for refusing an instruction will make that error which otherwise would not be an error seems to have originated in California in the case of the *People v. Hurley* (8 Cal. 392), where it is expressly based upon the assumption that the jury are aware of the contents of the instruction so refused. Whether at that time there existed any ground for such an assumption it is not important to inquire. It is at least certain that there is no ground for such an assumption now existing in the law or practice of this State. And in California the doctrine of the *State v. Hurley*, after being followed for a time (*People v. Ramirez*, 13 Cal. 172; *People v. Williams*, 17 Cal. 148), has in the later cases been quietly ignored. Nevertheless, it would be well if the suggestion of this court in the case of the *State v. Ferguson*,—that the rea-

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son for refusing the instruction should be noted thereon by the district judge—were generally observed. For a defendant might appeal without making any bill of exceptions, and in that case the charge of the judge would form no part of the record, whereas the instructions refused by him would come before us for review, and if we found that an instruction, manifestly correct and applicable to the case had been refused, and had no means of knowing that an equivalent instruction had been given, we might be compelled to reverse the judgment for a reason that in fact did not exist. In this case, however, there was no danger of that sort since the instructions presented by the defendant and allowed by the court covered everything embraced in those which were refused.

The fourth and last instruction refused by the court is as follows: "When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury as matter of fact before the jury can find a verdict of guilty."

We see no reason for refusing this instruction unless it is susceptible of the construction that the defendant could not be found guilty of *any* offense unless the intent to kill was proved to the satisfaction of the jury. It does perhaps bear that construction though such is not its most obvious meaning. If it had been the only instruction which presented the law upon this point, the slight ambiguity in the latter part of it might not have justified the court in refusing it, but as the same proposition is clearly embraced in three or four other instructions asked by the defendant and allowed by the court it was right to refuse it if it had any tendency to mislead or confuse the jury. And besides, even if it had not the slightest tendency to mislead the jury, although, on that supposition its refusal was erroneous, still the error was not prejudicial for the reasons given above. The same proposition had been stated to the jury over and over again, not in language chosen by the court, but in language of the defendant's own choosing.

The judgment of the district court is affirmed.

Points decided.

[No. 801.]

**THE STATE OF NEVADA, RESPONDENT, v. AH HUNG,
APPELLANT.**

WHEN JUDGMENT WILL BE AFFIRMED.—Where there is no motion for a new trial, or bill of exceptions, and where no error is suggested by counsel for appellant, the judgment will be affirmed.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

Robert M. Clarke, for Appellant.

J. R. Kittrell, *Attorney-General*, for Respondent.

By the Court, BEATTY, J.:

The defendant in this case appeals from a judgment convicting him of an assault with intent to inflict bodily injury. There was no motion for a new trial, and there is no bill of exceptions. The record discloses no error on the part of the district court, and none is suggested by counsel for appellant.

The judgment is affirmed.

EARLL, J., did not participate in this decision.

EX PARTE A. W. MAXWELL.

JEOPARDY—WHEN IT ATTACHES.—Whenever the accused has been placed upon trial, upon a valid indictment before a competent court, and a jury duly impaneled, sworn and charged with the case his jeopardy attaches, and the discharge of the jury before verdict, unless with the consent of the defendant, or the intervention of some unavoidable accident or some overruling necessity, operates as an acquittal.

IDEM—JURY FAILING TO AGREE.—The inability of the jury to agree upon a verdict is recognized as creating a necessity that justifies the discharge of the jury.

WHEN JEOPARDY DOES NOT ATTACH.—Whenever a trial has commenced, whether for misdemeanor or felony, and the judge discovers any imperfection which will render a verdict void or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings.

Argument for Petitioner.

IDEM.—Whenever anything appears showing plainly the fact that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist, and on making the adjudication matter of record, stop the trial, with the result above stated.

POWER OF COURT TO DISCHARGE A JURY BEFORE VERDICT.—The power of the court to discharge a jury, without the consent of the defendant, is not an absolute power, but must be exercised in accordance with established legal rules and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case.

IDEM—ADJUDICATION OF RECORD.—The facts and circumstances which induce the discharge of the jury, and an adjudication thereon, ought to be stated and appear in the record.

IDEM.—Where the only ground appearing was, that the foreman of the jury stated "they were unable to agree upon a verdict:" *Held*, that this was not sufficient ground to authorize the court to discharge the jury. The fact that the jury could not agree is an essential fact, the existence of which ought to be determined by the court and established by the record.

HABEAS CORPUS.—The writ of habeas corpus is not intended to have the force or operation of an appeal, writ of error, or certiorari; nor is it designed as a substitute for either.

IDEM—DISCHARGE OF DEFENDANT.—Where there has been a legal jeopardy, it is equivalent to a verdict of acquittal; and, on motion, the prisoner is entitled to his discharge; but the writ of habeas corpus will not lie.

HABEAS CORPUS before the Supreme Court.

The facts are stated in the opinion.

A. B. Hunt and T. W. W. Davies, for Petitioner.

The petitioner is entitled to be discharged. The discharge of the jury, on motion of the state, without the consent of defendant, was equivalent to a verdict of acquittal. (*State v. Callendine*, 8 Iowa, 288; *Commonwealth v. Clue*, 3 Rawle, 498; *Commonwealth v. Cook et al.*, 6 S. and Rawle, 577; *Wright v. State*, 5 Ind. 290; *Mahala v. State*, 10 Yerger, 533 and cases cited; *People v. Webb*, 38 Cal. 467, and cases cited; *Hurd on Hab. Corp.*, 330, 333; *People v. McLeod*, 25 Wend., 570–72; *Comp. Laws*, secs. 363–64, 368; *Hab. Corp. Act*, secs. 15, 16, 20; *People v. Martin*, 1 Parker's Cr. Rep., 187, and cases there cited; *People v. Tompkins*, 1 Par. Cr. Rep., 224; *State v. Ward*, 3 Halst., N. J. 120; *Ex parte Bollman & Swartwout*, 4 Cranch, 75; *State v. Stanley*, 4 Nev. 113.)

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J. R. Kittrell, Attorney-General, for the State.

I. The inquiry of the court is limited on *habeas corpus* to the existence, validity, and present legal force of the process. (Hurd on Hab. Corp. 331, 345.)

II. The discharge of a jury sworn to try a criminal case, is purely within the discretion of the judge who presides at the trial, and the statute in express terms constitutes him the exclusive judge as to the time when such a charge shall ensue. Whenever it shall satisfactorily appear to the court that there is no probability that the jury can agree upon a verdict, then the judge may order them discharged. There is no period of time prescribed by law for a jury to deliberate, and when they are ordered discharged for failure to agree upon the verdict, the presumption is that it appeared to the satisfaction of the court that there was no reasonable probability of an agreement. (Comp. L., secs. 2020-21.)

III. If the discharge of the jury in this case at the second trial was equivalent to acquittal, the remedy is not by *habeas corpus*, it is by motion, or plea. At a subsequent trial, petitioner could move his discharge, or plead former acquittal, and if the motion were overruled and the plea not accepted, then an appeal would lie. (41 Cal. 211.) For the practice on this point see *People v. Cage* (48 Cal. 326.)

By the Court, EARLL, J. :

It is alleged in the petition presented on behalf of Maxwell, that he is unlawfully imprisoned and restrained of his liberty by one Andrew Fife, the sheriff of the county of Lincoln.

The facts as presented by the petition, return of the sheriff and proofs submitted are substantially as follows: The prisoner was accused of having stolen twenty-two pieces of crude bullion, at said Lincoln county, of the alleged value of twenty-two hundred dollars, gold coin, the property of the Meadow Valley Mining Company, a corporation. He was arrested on said charge in the territory of Utah, the latter part of June, 1875, upon the requisition of the governor of this state, and on or about the first day of July delivered into the custody of said sheriff. That

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while he was thus in custody, and at the July term of the district court, held in and for said county, the grand jury found and presented an indictment charging him with the commission of said crime, and upon which indictment he was put upon his trial at the succeeding October term of said court; but the jury failing to agree upon a verdict, were discharged by the court, and the judge of said court thereupon, of his own motion, continued the cause for trial until the next term of the court, to be held in January, 1876. At the time the jury were thus discharged, the jurors stood seven for not guilty and five for guilty. At the January term of 1876 of said court, the prisoner was again brought to trial upon said indictment. A jury was regularly impaneled to try the case. The evidence and arguments of counsel were closed on the fourth day of March, and having received the instructions of the court, the jury retired in charge of the sheriff, duly sworn, to consider of their verdict. In less than three hours after the cause had thus been submitted, the jury returned into court, and by their foreman stated they were unable to agree upon a verdict; whereupon the court, against the objection of the prisoner and his counsel, discharged the jury from further consideration of the case. The entry in the minutes of the court is as follows: "The evidence being closed, after argument, the court instructed the jury, and they retired in charge of the sheriff duly sworn, and subsequently returned into court, and by their foreman stated they were unable to agree upon a verdict; whereupon the court discharged the jury from further consideration of the case. On motion the bail of the defendant is reduced from \$5,000 to \$3,000, to be approved by the court." It is alleged in the petition that when said jury were discharged, they stood nine for not guilty and three for guilty, and that they were discharged without legal necessity. It does not appear that any further proceedings were had in the case until the next term of the court. On the tenth day of April, 1876, and of the April term of the court the cause was again called for trial, and the court proceeded to impanel a jury to try the same. The jurors

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in attendance were called, sworn and examined as to their qualifications, and upon such examination, nine jurors were found competent, and left in the box subject to peremptory challenges. The panel being then exhausted, the said nine jurors were duly admonished by the court; and after being notified to be in attendance on the succeeding twelfth day of April, were permitted to separate, and then, by order of the court twenty-three additional jurors were drawn and a venire issued therefor, returnable on the said twelfth day of April, to which time the court adjourned.

The court convened on the said twelfth day of April, and the venire for the additional jurors having been duly returned, the roll of the jury was called, and the nine jurors who had been previously passed, subject to peremptory challenge, and nearly, if not all of the additional jurors summoned, were present. The court thereupon, of its own motion, called Andrew Fife, sheriff of said county, who, being sworn, testified: "That he could not find any person in the town who was willing to board or lodge the jury during the trial of this cause, and that he had used the utmost endeavors to do so, but had failed; that he could not get board or lodging for the jury, and knew of no way by which it could be obtained.

The bill of exceptions annexed to the petition, after reciting the above testimony, proceeds: "The court knowing the fact that two trials had been previously had, the first of which occupied twelve days, and the second six days, including night sessions, and that the trial about to take place would take as much time as the last trial, it made the following order, to wit: "Whereupon the court orders that the trial of said cause be continued until Monday, May 1, A. D. 1876, or until the further order of this court, and the jurors in the box are discharged from the further consideration of the case;" counsel for defendant entered his exception. Counsel for defendant then demanded that the trial proceed at once, which the court refused; to which ruling "counsel for the defendant then and there excepted." On the succeeding nineteenth day of April, the defendant, on an affidavit setting forth the proceedings had in his case,

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substantially as above stated, and also that the county of Lincoln does now, and has for some months last past, refused to furnish lights, fuel or food for affiant; that he has been kept in said jail at the expense of the Meadow Valley Mining Company, as to lights, food and fuel during said time last as aforesaid, and is still being so kept;" and that he had endeavored to procure bail, but was unable to do so; and upon notice to the district attorney, applied to said district court to be released from custody upon his own recognizance. The court refused to discharge the prisoner on said application, and he then and there by his counsel accepted. It further appears that on the first day of May the court again continued the trial of said cause, and it is alleged by the petition that the prisoner is unable to obtain a trial or to procure bail.

Upon this state of facts, it is claimed that the prisoner is entitled to be released from custody, if not absolutely, at least upon his own recognizance; and his discharge is urged upon two grounds: first, that the discharge of the jury on the fourth of March, upon the mere statement of the foreman of the jury, that they were unable to agree upon a verdict, was an illegal exercise of power in the court, and the jury having been thus discharged without the consent, and against the objections of the defendant, is equivalent to a verdict of acquittal, and that he cannot legally be held to further answer this or any future indictment for said offense. Second. That the refusal of the court to impanel a jury and proceed with the trial on the twelfth of April, and the subsequent continuance of the trial of his case to the first of May, was a denial of his right to a speedy trial, and by virtue of the provisions of sections 582 and 583 of the criminal practice act, operated as a legal discharge from custody. (Comp. L., 1684 and 2207.)

The first ground relied upon for the release of the prisoner presents for our consideration two questions of importance in the practical administration of criminal law, and so far as we are advised, have not been passed upon by this court. The first question to be considered is, whether the prisoner was in legal jeopardy upon his second trial, and

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the discharge of the jury, under the circumstances disclosed by the record, was equivalent to a verdict of acquittal. By the eighth section of the first article of the constitution of this state, it is declared that: "No person shall be subject to be twice put in jeopardy for the same offense." A similar provision is incorporated into the constitution of the United States, and in the constitutions of most of the respective states; but there is some diversity of opinion in the decisions as to what constitutes being "put in jeopardy." In some of the decisions, judges have expressed the opinion that this provision is but a constitutional recognition of an old and well-established maxim of the common law involved in the plea of former acquittal or conviction, and means no more than that "no person shall be twice tried for the same offense;" and that the jeopardy does not attach until a verdict is reached. (*United States v. Gilbert et al.*, 2 Sumner, 19; *People v. Goodwin*, 18 John. 188; *United States v. Haskell et al.*, 4 Wash. 402; *United States v. Penz*, 9 Wheat. 579.)

On the other hand, the courts of several of the states have gone to the opposite extreme, and held that a jury once sworn and charged with a criminal case involving "life and limb," cannot be discharged by the court before rendering a verdict, except by the consent of the prisoner, or the existence of some overruling necessity, and that the inability of the jury to agree upon a verdict does not create such necessity. (*Commonwealth v. Cook*, 6 Serg. & R. 577; *Commonwealth v. Clue*, 3 Rawle, 498; *McClury v. State*, 29 Pa. 383; *Williams v. Commonwealth*, 2 Gratt, 567; *Ex parte Spear*, 1 Dev. 491; *State v. Ephraim*, 2 Dev. & Bat. 162; *Mahala v. State*, 10 Yerg. 235; *Wright v. State*, 5 Ind. 290; *Ned v. State*, 7 Porter, 187.) Although there still exists some conflict and confusion in the opinion of judges upon this question, the rule now seems to be pretty well settled in the American courts that whenever the accused has been placed upon trial, upon a valid indictment, before a competent court, and a jury duly impaneled, sworn, and charged with the case, he has then reached the jeopardy, from the repetition of which this constitutional provision protects him, and, therefore, the discharge of the jury be-

fore verdict, unless with the consent of the defendant, or the intervention of some unavoidable accident, or some overruling necessity, operates as an acquittal, but the inability of the jury to agree upon a verdict, is recognized as creating such a necessity.

Bishop, in his treatise on criminal law, after an elaborate review of the authorities, and a discussion of the whole subject, says: "The better view of this whole question may be stated as follows; Whenever a trial has commenced, whether for misdemeanor or felony, the judge discovers any imperfection which will render a verdict against the defendant either void or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings. Whenever, also, anything appears showing plainly the fact, that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist; and on making the adjudication matter of record, stop the trial, with like result as before. But, without the adjudication, the stopping of the trial operates to discharge the prisoner. In other words, when the record shows an actual jeopardy to have taken place against the defendant, he is protected thereby from further peril for the alleged offense. But where the record shows also matters disproving the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him." (Bish. on Crim. Law, 873.)

Sections 396 and 397 of the criminal practice act of this state provide as follows: "Sec. 396. If after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

"Sec. 397. Except as provided in the last section, the jury shall not be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by the consent of both parties, entered in the minutes, or unless at the expiration of such time as the court shall deem proper, it satisfactorily

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appear that there is no reasonable probability that the jury can agree."

These provisions of the statute must be construed with reference to the constitutional restriction in respect to a second jeopardy, and when so construed, it is apparent they are in perfect accord with the doctrine above cited from Bishop. Both recognize the trial courts invested with power, in the exercise of a sound legal discretion, to discharge a jury after the cause has been submitted to them, without the consent of the defendant, and without the discharge constituting a legal bar to a future trial, in all cases of manifest necessity, whether such necessity arises from some physical cause occurring during the trial or the deliberation of the jury, or from the inability of the jury to agree upon a verdict.

This discretionary power thus recognized is, however, an absolute unrestricted discretion, depending upon the mere will of the judge, but is a sound legal discretion, to be exercised only upon sufficient grounds. "The power of the court to discharge a jury without the consent of the defendant," said Mr. Justice Sprague, in *Ex parte McLaughlin*, "is not an absolute uncontrolled discretionary power. It must be exercised in accordance with established legal rules, and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case, and in this state is subject to review by an appellate court." (41 Cal. 211.) That it ought to be exercised in cases of mere disagreement, only after a long effort of the jury to agree, and when it satisfactorily appears to the court that there is no reasonable probability of their doing so, is well settled. And it seems to be equally well settled that the facts and circumstances, which induce the discharge, and an adjudication thereon, ought to be stated and appear in the record. (*State v. Ephraim*, 2 Dev. & Bat. L. 162; *Conway & Lynch, v. The Queen*, 1 Cox's Cr. Cas. 1; *People v. Cage*, 48 Cal. 323; *Poage v. State*, 3 Ohio St. 229; *State v. Prince*, 63 N. C. 529.)

The question, then, recurs, whether the facts and circumstances appearing upon the record of the second trial of

the defendant, were sufficient to authorize the court, in the exercise of a legal discretion, to discharge the jury without the defendant's consent. We are of opinion no sufficient ground appears. True, the record states that the jury "retired in charge of the sheriff duly sworn, and subsequently returned into court and by their foreman stated that they were unable to agree upon a verdict. Whereupon the court discharged the jury from further consideration of the case." Now for what reason were the jury thus discharged? The record is silent as to the length of time the jury were out, but it is clear that there was no necessity for their discharge in consequence of its having been so near the end of the term (as limited by the statute), as to preclude further deliberation on the part of the jury, because the ensuing term did not commence until the first Monday (3d) of April. Was it, then, because the court was satisfied that the jury had deliberated a sufficient and proper length of time, and that there was no reasonable probability of their being able to agree upon a further deliberation? The record does not so state; nor does it appear that the court so adjudged. The only ground appearing, was, that the foreman of the jury stated, that "they were unable to agree upon a verdict." This was clearly insufficient, and was no ground for the exercise of that "delicate and highly important trust that only exists in cases of extreme and absolute necessity." The court may have been satisfied that the jury were unable to agree upon a verdict, and that there was no reasonable probability of their doing so upon further consultation and deliberation. But these were essential facts, the existence of which, ought to be determined by the court and established by the record. And as the record fails to establish the existence of such facts and such determination, it follows that the discharge of the jury was an illegal exercise of power on the part of the court.

We are, therefore, of opinion that the prisoner has been once put in jeopardy within the meaning of the constitutional provision under consideration, and that the discharge of the jury, under the circumstances disclosed by the record, was equivalent to a verdict of acquittal. But the fur-

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ther question in this connection is, whether, upon the facts here presented the prisoner is entitled to be discharged from custody on *habeas corpus*. There has been no verdict or judgment of acquittal entered in the trial court, and hence the indictment is still pending therein. Nor does it appear that the prisoner, at the time the jury were thus discharged or at any subsequent time, applied to that court to be released from custody on the ground of his former jeopardy. That he was at liberty to waive his rights under this constitutional provision, and have his case submitted for trial before another jury, cannot be doubted. Mr. Bishop, in his commentaries on criminal law procedure, says: "Since a defendant can, if he will, waive his rights under this constitutional and common law provision, it follows, that, if he would take advantage of a former jeopardy, he must, in some way which accords with the rules of criminal law procedure, bring the fact to the attention of the court." (1 Crim. Pro. 806.)

He further says: "If there has been a legal jeopardy, this is equivalent to a verdict of acquittal, and on motion, without plea, the prisoner is entitled to his discharge. * * But a writ of *habeas corpus* will not lie." (Id. 821, and see authorities cited.) In support of the latter proposition, however, he cites only the cases of *Wright v. The State* (5 Ind. 290), and *Ex parte Ruthven* (17 Mo. 541). On referring to those cases it will be observed that the decisions were respectively based on statutes regulating proceedings on the writ of *habeas corpus* entirely unlike the statute of this state on the same subject. The statutes of Indiana and Missouri, respectively forbid the court or judge on *habeas corpus* to inquire into the merits of an application, and discharge the prisoner, in a case where he is confined under an indictment, or under process issued thereon. No such restriction is to be found in the "act concerning the writ of *habeas corpus*" of this state; on the contrary, by the provisions of the fifteenth and sixteenth sections of said act, the court or judge, on the return of the writ, is required to hear the allegations and proofs and to look into all the facts of the case, whether the prisoner be detained under an indict-

ment, or under process issued thereon, as well as when detained upon any other process "and to dispose of such party as the justice of the case may require." And by section 20 it is provided: "If it appears on the return of the writ of *habeas corpus* that the prisoner is in custody by virtue of process from any court of this territory (state), or judge, or officer thereof, such prisoner may be discharged. * * Where the imprisonment was at first lawful, yet by some act, omission, or event, which has taken place afterwards, the party has become entitled to his discharge." (Compiled Laws, 363, 364, 368.)

It will thus be seen that the powers of the court, or judge, charged with the duties of allowing this important writ, and of determining the rights of a party thereunder, are by these statutory provisions greatly extended beyond what existed at the common law, and beyond that conferred by the respective statutes of Indiana and Missouri upon which the decisions in the cases above referred to rest.

But notwithstanding the powers of the court and judge are, by these enactments, greatly enlarged, yet it is apparent they were not intended by the legislature to have the force and operation of an appeal, a writ of error, or a certiorari; nor were they designed as a substitute for either. And although it is the duty of the court, in the exercise of its proper jurisdiction under these provisions of the statute, to inquire into all the facts of the case, without regard to the nature of the process or authority under which the prisoner is detained, and, although the original commitment was lawful, to discharge him, if it appears that by reason of the happening of some subsequent "act, omission, or event," he has become entitled to his discharge, nevertheless the "act, omission, or event" which will justify the court in discharging the prisoner must be such as to render the process or authority under which he is detained absolutely void, and not merely voidable. (Hurd on Hab. Corp. 332.)

It follows, therefore, that inasmuch as the defendant was at liberty to waive his constitutional right to be protected from a second jeopardy, and to have his case re-submitted for trial before another jury, the action of the court in dis-

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charging the jury, although equivalent to a verdict of acquittal, did not render the process by virtue of which he is detained in custody void, but voidable only. It is, therefore, apparent that the discharge of the jury was not a final disposition of the case by the district court, and consequently the defendant must be regarded as in custody under the indictment, and still subject to the jurisdiction of that court; and hence the event which, within the meaning of the statute, would entitle the prisoner to his discharge on habeas corpus has not occurred. Upon the authorities before cited, that court evidently has power to discharge him on motion. At all events, in case he is again placed on his trial, he may, under the provisions of section 301 of the criminal practice act (Comp. L. 1925), take advantage of his previous jeopardy, by giving the facts attending his former trial, as disclosed by the record in the case, in evidence under his plea of "not guilty." (*People v. Cage*, 48 Cal. 323.)

The remaining ground upon which the prisoner's discharge is urged rests upon the orders of the court made on the 12th day of April and the 1st day of May, respectively, postponing the trial. As neither of said orders continued the trial of the cause for the term, it is clear that the principle involved is not distinguishable from that decided in the case of *Ex parte Larkin*, at the April term of this court, in which we held "that the regulation of the business of the term is a matter exclusively within the control of the judge, and cannot be interfered with by this court, certainly not in this proceeding."

It therefore follows that the prisoner must be remanded to the custody of the sheriff of Lincoln county, and it is so ordered.

BEATTY, J., concurring:

In regard to the first ground upon which the petitioner claims his release, that is, that the discharge of the jury without a verdict, at the January term of the district court, amounted under the circumstances to an acquittal, I concur in the conclusion reached by Justice Earll, that, even if it

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did amount to an acquittal, it will not avail the petitioner on *habeas corpus*. The question whether he has been acquitted or not must be determined in another proceeding, and, consequently, the present occasion does not, in my judgment, call for any expression of opinion as to the effect of the discharge of that jury.

In regard to the second ground relied on by the petitioner, it is clear that no case had arisen, at the date of the filing of his petition, to which the provisions of secs. 582, 583 of the criminal practice act are applicable. He had been brought to trial at the first and second terms after he was indicted, but the juries had failed to agree. At the next term of the court his case had been continued from one day to a later day but not over the term; and when this petition was filed the term was but half expired. It is clear, therefore, that his application to this court was premature. He should have waited till the April term had expired without his being brought to trial, or, at least, until his case had been continued over the term, and then he should have moved the district court for his discharge, or for his release on his own recognizance. If his motion had then been denied without good cause, his imprisonment would have become unlawful, and the writ of *habeas corpus* would have been his proper remedy.

It should be understood that an imprisonment which is at first lawful, does not become unlawful until the right to be discharged has accrued, and that right has been denied, after a proper application to the court or officer whose duty it is to act in the premises. In cases of this sort, the statute expressly provides that the application to be discharged or bailed shall be made to the district court in which the indictment is pending, and it would seem that no express statutory provisions ought to have been required to demonstrate the propriety of such a course.

I concur in the order to remand.

Argument for Appellant.

[No. 725.]

THOMAS D. HUNT ET AL., APPELLANTS, v. JANE G.
HUNT ET AL., RESPONDENTS.

CONSTRUCTION OF WILLS.—The testator, by his will, disposed of his property to his wife, "having the fullest confidence in her capacity, judgment, discretion and affection, to properly bring up, educate and provide for our children, and to manage and dispose of my said property in the best manner for their interests and her own:" *Held*, that the devisee took the property devised as absolute owner, and not upon trust.

IDEM.—In construing this will the court held, that the widow had the absolute right to sell and dispose of the estate at her discretion.

IDEM.—SECTION 150 OF THE PROBATE ACT CONSTRUED. — The probate act regulates the proceedings of executors and administrators as such, and acting in that capacity alone, the validity of their acts depends upon a compliance with its provisions; but the act has no application to a case like the present, where the executrix is owner of the residuary estate.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

B. C. Whitman, for Appellant.

I. The main object of this appeal is to show that the wife did not take absolutely, and had at most a life interest, coupled, probably, with a limited power of disposal. The primary and decisive question is, was there a trust created by the language quoted? Although the very numerous cases are seemingly contradictory, still, when examined by the light of the rule as stated by Redfield on Wills (vol. 2, 411), they will be found, on the whole, tolerably consistent. Given clear subject-matter, object and surrounding circumstances similar to those of this case, and the weight of authority is to make the words of the will mandatory. (*Massey v. Sherman*, Ambler, 520; *Macey v. Shumer*, 1 Ark. 389; *Hart v. Tribe*, 18 Beav. 215; *Gully v. Cregoe*, 24 Id. 185; *Shovelton v. Shovelton*, 32 Id. 143; *Warner v. Bates*, 98 Mass. 275; *Young v. Young*, 68 N. C. 309; *Curnick v. Tucker*, 7 Moak's Eng. R. 845.)

II. In no aspect of the case, under the rules of equity, is the purchaser absolved from the liabilities of the trust sim-

Argument for Appellant.

ply because he pays an adequate consideration, unless the devisee under the will had an absolute power of alienation untampered by any consideration. (Lewin on Trusts, L. L. ed., vol. 24, 104-5, sec. 206; Redfield on Wills, 2d ed. vol. 3, 537, sec. 96, 545; sec. 104; *Price v. Reeves*, 38 Cal. 457.)

III. If there is any power of sale under the will, it is only contingent, and entirely governed by the consideration of the best interests of the children, and a purchaser must, in some manner, ascertain that the sale was thus made, for his own self-protection. The only manner in which the ascertainment could have been had, would have been by order of the probate court, as having submitted herself thereto, the executrix and devisee was bound to proceed in all things under its order, and any sale otherwise made was void. (Redfield on Wills, vol. 3, 2d. ed., 565, sec. 130.)

IV. If it be held that the law in existence at the death of the testator governs the estate, then that must be the law of Utah, and not the common law. (*Grimes's Estate v. Norris*, 6 Cal. 621; *Tevie v. Pitcher*, 10 Id. 465; *Downer v. Smith*, 24 Id. 114.)

V. The intention of the testator was to appropriate his property to the use of his wife and children, leaving to her the management and disposal thereof; but only with reference to the desired objects, and between themselves. The confidence that he had was not general and with regard to all subjects, but that she would, in a particular manner, do a special thing. Had he intended to rest the fee in his wife, or give a power of sale, apt words would have been used to express such intentions. That there was a trust, I hope is proved; that there was no power of sale, I think equally demonstrable. "To manage" involves a holding of the property; it could not be managed if alienated. To this power of management is added, not disjoined, the power "to dispose of my said property in the best manner for their (the children's) interests and her own." To dispose of when absolutely used, does not positively mean to sell, but rather to divide—to allot. Can the words mean anything else as to these beneficiaries for whom their father is so industriously careful? The tendency of later decisions is all

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against the wresting of language from its plain sense, and toward giving it a natural meaning; or to express it more fully, taking the circumstances existing at the date of the will, to give to the words of the testator the interpretation which would naturally arise upon them if then spoken. Adopting this rule, and weighing the words "manage and dispose," in connection with the other language of the will, no absolute power of sale or alienation can be evolved; nor do they, with any strength, evidence even a contingent power dependent and arising from the necessities of the children or wife, or both, even if exercised under the direction of the probate court; but they rather indicate that the property was to be managed for, and disposed of among and between the mother and children. (*Young v. Young*, 68 N. C. 309; *Curnick v. Tucker*, 7 Moak's Eng. R. 845.)

A. B. Elliott, for Appellant.

I. The letter must give way to the general meaning of the will. (*Den v. McMurtrie*, 3 Green, N. J., 271.)

II. The will created a trust in favor of the children and heirs at law of the testator. (*Lambe v. Eames*, 10 Eq. Cas. Law Rep. 273; *Story's Eq. Jur.*, vol. 2, sec. 1065; *Crockett v. Crockett*, 1 Hare Eng. Ch. 451; *Redfield on Wills*, vol. 1, 175; 2 *Story Eq. Jur.*, sec. 1068; *Lewis on Trusts*, 181; *Walker v. Quigg*, 6 Watts. 87; *Wright v. Atkyns*, 17 Vesey, 255.)

III. The trust being established, it must be shown that the deviser sold the property for the purpose specified in the will, and that the purchaser bought, without notice of the trust, in good faith, for a full and adequate consideration. (*Walker v. Quigg*, 6 Watts. 91; *Redfield on Wills*, vol. 3, secs. 17, 95, 104; *Story Eq. Jur.*, vol. 2, sec. 977, 1131; *Lewis on Trusts*, 244.)

C. H. Bryan, also, for Appellant.

I. The will creates a trust. (*Taylor v. Plaine*, 1 Am. Rep. 34; *Redfield on Wills*, 176.)

II. All matters of trust, except when controlled by statute, are under the direction of courts of equity. (*Matter of*

Argument for Respondent.

Van Wyck, 1 Barb. 565; *Knight v. Loomis*, 17 Shep. 204; *Gibbons v. Riley*, 7 Gill. 81.)

M. N. Stone, for Respondent.

I. The will gives the property absolutely to Mrs. Hunt free from any trust in favor of her children. The clause in the will, "having the fullest confidence," etc., does not create a trust, but at most is only an expression of confidence in the devisee. (Story's Eq., vol. 2, sec. 1069, and cases cited; *Bristol v. Austin*, 40 Conn. 439; *Gilbert v. Chapin*, 19 Conn. 346; *Pennock's Estate*, 20 Penn. St. 268; *Webb v. Woods*, 2 Simons, N. S., 42; Eng. Ch. Repts. 270; *Lambe v. Eames*, Eng. Eq. Cases, vol. 10, 270; *Same v. Same*, Eng. Ch. Appeal Cases, vol. 6, 600; *Mackett v. Mackett*, Eng. Eq. Cases, vol. 14, 52; *Brook v. Brook*, 3 Sm. & Giff. 280; *Ex parte Payne*, 2 Younge & Coll. 636; *Green v. Green*, 3 Ire. Eq. 90; *Redfield on Wills*, vol. 2, 415; *Reeves v. Baker*, 18 Beavan, 372; *Howorth v. Dewell*, 29 Beavan, 18; *Fox v. Fox*, 27 Beavan, 301; *Smith v. Bell*, 6 Pet. 68.)

II. Conceding, for the sake of argument, that the will creates a trust, it gives to the defendant, Mrs. Hunt, the power to *dispose* of the property *in the best manner*, and also vests in her a beneficial interest therein. There was, therefore, no necessity for a probate order to sell the property, she having power to sell without such order. Her conveyance of the premises was all that was necessary to pass the title. (*Norris v. Harris*, 15 Cal. 256; *Lared v. Casaneuva*, 30 Cal. 567; 18 Cal. 299; *Battelle v. Parks*, 2 Mich. 531; *Conklin v. Egerton, Admin.*, 21 Wend. 436.)

III. The probate law of this state cannot apply to this case so as to interfere with the power to sell conferred by the will. The will was made in 1859, and the probate act was not adopted until 1861. To make the act retrospective would impair the vested right of the devisee, under the will, to dispose of the property devised in the best manner her judgment might dictate. (*Conklin v. Egerton, Adm.*, 21 Wend. 435; *Estate of Dekney*, 49 Cal. 77.)

IV. Even if there is a trust, it is coupled with a power

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to sell, and Mrs. Hunt having sold the property to a purchaser who bought it in good faith for more than an adequate consideration, he should be protected.

The present well established rule of law, in regard to trust estates, is, that where the trustee holds the trust estate for the purpose of sale and conversion into money, or with power of sale and conversion, any one who in good faith accepts such transfer upon adequate compensation will acquire a valid title. It is only where no power to dispose of the property is given that the purchaser must see that the purchase-money is applied by the trustee to the purposes of the trust. (Redfield on Wills, vol. 3, p. 537, sec. 95.)

By the Court, BEATTY, J.:

In August, 1861, Davis S. Hunt died in Storey county, in this state, leaving a widow, the above named defendant, Jane G. Hunt, and three minor children, who are the plaintiffs herein. By his last will, made in 1859, after directing the payment of his debts, the said Davis S. Hunt disposed of his property as follows:

"Second. I give, devise and bequeath, all the rest and residue of my property, real, personal and mixed, of every kind and nature whatsoever, to my beloved wife, Jane G. Hunt, having the fullest confidence in her capacity, judgment, discretion and affection, to properly bring up, educate and provide for our children, and to manage and dispose of my said property in the best manner for their interests and her own." He also appointed his wife sole executrix. In February, 1862, this will was admitted to probate and letters testamentary issued to the said Jane G. Hunt, who filed an inventory of the property of the estate which included a certain house and lot in Virginia city. Pending the proceedings in the probate court she conveyed this house and lot to Mercedes Navarro, one of her co-defendants, who conveyed it to L. P. Drexler the other of her co-defendants. No authority was obtained from the probate court to make this conveyance.

In August, 1874, the children of the deceased, having

come of age, commenced this action against their mother and her grantees, seeking to charge them as trustees of the said house and lot, and demanding among other things an accounting for the rents and profits. Mrs. Hunt and Mercedes Navarro made default, and Drexler alone defends.

The cause was tried by the district judge who found, in addition to the facts above stated, that Drexler was a purchaser in good faith and for a valuable consideration; and concluding, as matter of law, that the widow under the terms of the devise, took the beneficial as well as the legal estate, or that, if she was a trustee, she at least had full power to sell and convey, at her discretion, rendered a judgment in favor of Drexler for his costs. From that judgment the plaintiffs appeal, and in support of their appeal rely upon the proposition that their mother took under the will only the legal estate in the property of their deceased father, to be held in trust for them and herself, without any power of alienation, and that consequently she and her grantees are accountable to them as trustees. This, of course, involves a construction of the will, and the first question is whether the words, "having the fullest confidence in her capacity," etc., create a trust. There are numerous cases to be found in support of either an affirmative or negative answer to this question. The earlier English cases support the affirmative. The later English cases generally support the negative, and so do most if not all of the cases in the United States to which our attention has been called. Those relied upon by the appellants may, we think, be easily distinguished from this by reference to the terms of the wills under consideration. Without attempting to review the numerous decisions upon this point (which would be almost an endless task) we are inclined, after a careful examination of the text writers and the cases cited in the briefs of counsel, to coincide with the conclusions of Judge Story in relation to this matter, and to hold that in this case the devisee took the property devised as absolute owner and not upon trust. Judge Story says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish and desire, into positive and per-

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emptory commands, is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides, that where the intention of the testator is to leave the whole subject, as pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot, and ought not to be held to create a trust. Now words of recommendation, and other words precatory in their nature, *imply that very discretion*, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." (2 Story's Eq. Jur., sec. 1069.)

Redfield expresses himself still more strongly to the same effect. (Redfield on Wills, vol. 2, p. 423, sec. 15 *d.*)

There are, no doubt, strong reasons to be urged in support of the opposite view; but, on the whole, we should be disposed, if it was necessary to decide the point in this case, to decide it in conformity with the views of Judge Story and Mr. Redfield. But in this case it does not appear to be necessary to decide whether or not the defendant, Jane G. Hunt, is accountable to the plaintiffs for the proceeds of her husband's estate. Whether she took as a trustee or as absolute owner, it seems clear that she had the absolute right to sell and dispose of the estate at her discretion. The plain intention of the testator is that she should take his property and exercise the same control over it that he could himself

have exercised. She is not only to “manage” it, but to “dispose of” it, in case that appears to her to be the best thing for her own and her children’s interest, and the obvious meaning of the words “dispose of,” used in that connection, is to sell and convey. “Having the fullest confidence in her capacity, judgment, discretion and affection,” nothing was more natural than that he should have wished to confer upon her full power to sell and convey any portion of his real estate, untrammelled by the delays and difficulties of proceedings in the courts of chancery or probate. By such a course he rendered his estate more valuable, by enabling his trustee, if such she was, to sell without delay in case of an advantageous offer, and to give a clearer title than can easily be got through the intervention of the tedious, and dilatory, and complicated proceedings in the probate courts. He supposed he was taking the best care of her interests and the interests of his children in trusting everything to her discretion. If the event has failed to justify his confidence in her capacity, judgment, and affection for his children, it can only be said that his will is to be interpreted, not by the event but in the light of the confidence which he reposed in her at the time it was made. If she has wasted and mismanaged an estate for which she is morally, if not legally, accountable to her children, it is a misfortune for which they cannot be compensated by taking from a *bona fide* purchaser property which she had full power to sell and he an undoubted right to purchase.

But counsel for appellants contends that they may maintain this action by virtue of the provisions of section 15 of the act concerning wills. (Comp. L., sec. 826), which reads as follows: “When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate.”

This section has no sort of application to this case. The testator did not forget his children or any one of them in making his will. On the contrary, they were distinctly in

his mind, and are expressly provided for by leaving them and his estate to the disposal of the widow. (See *Payne v. Payne*, 18 Cal., 301-2, and other cases cited in respondent's brief.)

Counsel for appellants also relies upon section 150 of the probate act (C. L. sec. 630) which provides that "No sale of any property of an estate of a deceased person shall be valid unless made under an order of the probate court," etc.

If this provision were applicable, in a literal sense, to this case it would, no doubt, invalidate the sale to Drexler. But it is not applicable at all. The probate act regulates the proceedings of executors and administrators, as such, and, acting in that capacity alone, the validity of their acts depends upon a compliance with its provisions. In this case, however, the executrix dealt with the property in a double capacity; she was executrix and also owner of the residuary estate, or, at least, a trustee expressly empowered to sell. The estate being charged with the payment of the testator's debts, the creditors were under the protection of the probate court, and, as against them, no sale would have been valid unless made in pursuance of an order of court. But the plaintiffs are not creditors of the estate with rights superior to those of the devisee. They are claimants whose rights, whatever they may be, are subordinate to her power to sell. (See *Estate of Delaney*, 49 Cal. 77.)

Another point made by appellants is that, although, as trustee, Mrs. Hunt might have had full power to sell the estate without any order of court, yet, having gone into court, seeking its advice and submitting herself to its control, she was guilty of a contempt of court in making a sale without its authority.

If this were true it would not necessarily follow that because she was guilty of a contempt, therefore Drexler has no title. But, aside from this consideration, the point is fully disposed of by what is said in respect to the preceding point.

Mrs. Hunt did not go into the probate court for advice as to her conduct as trustee (it was not the court to go to for that purpose), but merely to enable her to clear the estate from the claims of creditors. As executrix she was

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amenable to its orders, but as trustee she was entirely independent of its control.

As there was no motion for a new trial, it is scarcely necessary to say that the argument of counsel, that the findings of the district judge are against the evidence, cannot be considered.

The judgment is affirmed.

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13	267

[No. 784.]

AARON LAYTON, RESPONDENT, v. JAMES FARRELL,
APPELLANT.

SIXTEENTH AND THIRTY-SIXTH SECTIONS, ENABLING ACT OF CONGRESS, CONSTRUED.—The seventh section of the enabling act of Congress must be construed as a grant to the state *in present*, in the nature of a float, taking effect upon specific tracts of land as soon as the same are surveyed by the United States, and not before.

IDEM—PRE-EMPTIONERS.—If *bona fide* settlements were made upon the sixteenth and thirty-sixth sections by pre-emptioners prior to the survey of the lands, then the title would not pass to the state, because they were otherwise disposed of, but other lands equivalent thereto were granted to the state in lieu thereof.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts of this case, as found in the court below, are as follows:

The land in dispute is the north-west quarter of section sixteen, in township forty-one, north of range forty-three east, Mount Diablo base and meridian, containing one hundred and sixty acres. It is agricultural land. On the 19th day of June, A. D. 1873, said land was unoccupied; and on the 20th of said month the defendant Farrell took peaceable possession of said land, and remained in peaceable possession thereof until April 6th, A. D. 1875; that after April 6th, 1875, he remained and still remains in possession of said land; that on the 20th of June, 1873, the defendant settled in person upon said land and premises with a view to pre-empt the same under the laws of the United States; that between June 20th, 1873, and September, 1873, the

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defendant erected a dwelling-house and made other valuable improvements upon said land; that since September, 1873, he has continuously resided upon and improved the same in person; that during all of said period, to wit, since June 20, 1873, his home has been upon said land, and that during said time he has had, or claimed no other home, and no other land; that on the 20th of June, 1873, the defendant was a lawful pre-emptioner of the public lands of the United States, and ever since has been, and now is, such lawful pre-emptioner; that township forty-one north, of range forty-three east, Mount Diablo base and meridian, including the land in dispute, was surveyed by the United States government in September and October, 1873, and that prior to that time it was unsurveyed; that the plat of said township was approved by the United States surveyor-general for the state of Nevada, January 30, 1874; that said plat was filed for record in the office of the United States land-office at Carson city, Nevada, February 10, 1874; that defendant filed his declaratory statement in the United States land-office at Carson city, Nevada, in Carson land district, wherein said land in controversy is situated, April 1, 1874, according to law in such cases, claiming said land as a pre-emptioner; that in said declaratory statement defendant claimed settlement on said land, June 20, 1873; that on the 25th of September, 1875, the defendant made proof before the register and receiver of said United States land-office to their satisfaction relative to said pre-emption claim, and that said officers decided in favor of defendant's right to purchase said land from the United States government in accordance with his said declaratory statement as a pre-emptioner; that after making such proof as aforesaid, and after the decision of said officers of said land-office, the defendant paid to the United States receiver of said land-office, for said land, the sum of two hundred dollars, at the rate of one dollar and twenty-five cents per acre, which was the purchase-money paid to the government of the United States for said land, and received his receipt therefor; that in July, 1873, one Reuben Layton duly applied at the state land-office at Carson to purchase said land, and on the 6th

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of April, 1875, the state of Nevada issued its patent in due form to said Reuben Layton for said land; that on the 19th day of May, A. D. 1875, said Reuben Layton and wife conveyed said land to the plaintiff, Aaron Layton, by deed of conveyance in due form; that the defendant holds possession of, and claims said land and the right of possession of said land as a pre-emptioner under the laws of the United States, and by purchase as aforesaid, and not otherwise.

The court below rendered judgment in favor of the plaintiff for the possession of said land. The defendant appeals.

O. R. Leonard, for Appellant.

I. In construing a statute the primary object of the court is to ascertain the intention of the law-makers. To do this, resort is had to the language used, and also to the object intended to be accomplished by the act. If the statute can be construed, reasonably, so as to uphold the intended object of the legislature, courts will so construe it. And when there are two or more laws upon the same subject, they must be construed so as to maintain all, if possible. (3 Scammon's R. 153; Id. 144; 19 Ill. 38; *Cullerton v. Mead*, 22 Cal. 95; *McMinn v. Bliss*, 31 Id. 122; *People v. Broadway Wharf Co.*, 31 Id. 34; *People v. Turner*, 39 Id. 370; *Merrill v. Gorham*, 6 Id. 41; *Burnham v. Hays*, 3 Id. 115; *Ex parte Ellis*, 11 Id. 222.)

II. Grants, if practicable, must be interpreted so as to effect the intention of the grantor. (*Rice v. Railroad Co.*, 1 Black, U. S. R. 360.)

III. It has never been the intention of Congress that the legal or equitable title to any specific parcel of land should vest in this state before survey. It is evident that the state accepted the 16th and 36th sections, or lands in lieu thereof, with the same understanding, and with reference to the provisions of section 2275, U. S. Revised Statutes. (*Vile* sec. 4, p. 195, Stat. Nev. 1866; sec. 1, p. 165, Id. 1867; sec. 1, p. 135, Id. 1871; sec. 1, p. 120, Id. 1873.)

The state land register of this state, in his "Instructions" to purchasers of land from the state, says: "No

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application to purchase land from the State of Nevada can be received until after the land desired is surveyed by the United States authorities." (See "Instructions and Laws for the purchase of land from the State of Nevada," dated March 5, 1873, issued by Hon. John Day, state land register.)

IV. The legal, or any, title to the premises in controversy in this action, did not vest in the State of Nevada prior to survey; and appellant's pre-emption rights having attached prior thereto, the title never passed to the state, and is now in appellant. (Sec. 2275, U. S. Revenue Statutes; sec. 11, Enabling Act of Nevada; *Courchaine v. Bullion M. Co.*, 4 Nev. 369; *Wall v. Blasdel*, 4 Id. 246; *Kissell v. St. Louis Public Schools*, 18 How., U. S., 19; *Cooper v. Roberts*, 18 Id. 179; *Railroad Co. v. Smith*, 9 Wall., U. S., 94; *Terry v. Megerle*, 24 Cal. 609; *Grogan v. Knight*, 27 Id. 515; *Copp's Mining Decisions*, 115; *Zabriskie's Land Law*, 61, 2d Subdiv.; Id. 493; *Toland v. Mandell*, 38 Cal. 34; *Middleton v. Low*, 30 Id. 603.)

V. We also claim that from the general policy of the United States government relative to public lands the legal title to the premises in controversy in this action did not pass to the state prior to the survey thereof, in September and October, 1873; and that at the time of and prior to survey, appellant had acquired all the rights of a lawful pre-emptor therein; that under such circumstances, upon due proof and full payment, the title to the said premises passed from the United States government to the appellant for all the purposes of this action, where it now remains, for it is admitted that appellant's rights are the same as though he now held a patent from the government, and such are the authorities. (4 Nev. 369; 5 Minn. 223; 3 How., U. S., 458; 4 Wall. 217.)

M. S. Bonnifield and T. W. W. Davies, for Respondent.

Counsel cite and rely upon *Heydenfeldt v. Daney G. & S. M. Co.* (10 Nev. 291), and the argument and authorities there cited by counsel for appellant.

By the Court, HAWLEY, C. J. :

The decision in this case involves a construction of the seventh section of the enabling act. (Stat. 1864-5, 37, sec. 7.)

When does the title vest in the state to the sixteenth and thirty-sixth sections granted by said act? This identical question was presented to the court in the case of *Heydenfeldt v. Daney, G. S. & M. Co.* (10 Nev. 290), and all the authorities bearing upon the subject were then carefully examined; but the decision finally turned upon other grounds, and the question was, by a majority of the court, left undecided.

Upon a review of the authorities we have arrived at the conclusion that the enabling act must be construed as a grant to the state *in presenti*, in the nature of a float, taking effect upon specific tracts of land as soon as the same are surveyed by the United States, and not before. When the enabling act was passed, the land was not surveyed, and until the survey was made the title of the state did not attach to any specific tracts of land. When the survey was made the location of the land became certain, and at that time "the title, which was previously imperfect, acquired precision and became attached to the land." (*Schulenberg v. Harriman*, 21 Wall. 60.) If *bona fide* settlements were made upon the sixteenth or thirty-sixth sections by pre-emptioners, prior to the survey of the lands, then the title would not pass to the state, because they were otherwise disposed of, but other lands equivalent thereto were granted to the state in lieu thereof.

There is some conflict in the decisions of the courts upon this subject, but the conclusions we have reached are in accord with the whole current of decisions of the United States land-office (*Keystone Case*, Copp's U. S. Mining Decisions, 109), and are sustained by the following authorities: *Wall v. Blasdel*, 4 Nev. 246; *Terry v. Megerle*, 24 Cal. 609; *Grogan v. Knight*, 27 Id. 515; *Middleton v. Low*, 30 Id. 597; *Toland v. Mandel*, 38 Id. 31; *Railroad Co. Fremont County*, 9 Wall. 89; and other cases cited in appellant's brief.

Opinion of Beatty, J., concurring.

It clearly appears from the undisputed and admitted facts contained in the record that appellant is entitled to the land in controversy, unless the legal title passed from the government of the United States to this state at the date of the enabling act.

It is therefore ordered that the judgment of the district court be and the same is hereby reversed, and the court is directed to enter a judgment in favor of appellant.

BEATTY, J., concurring:

The principal question to be determined in this case is, in my opinion, quite distinct from any that was discussed or involved in *Heydenfeldt v. The Daney Company*. It is true that both cases involve a construction of the grant of lands to this state contained in the seventh section of the enabling act. But in that case the decision turned not upon the construction of the grant, but upon the effect of subsequent legislation by congress and the legislature of Nevada, while in this case it depends upon the effect of an act of congress passed prior to the enabling act.

The principal questions in *Heydenfeldt v. Daney Company* were: First. Did the grant to this state of the sixteenth and thirty-sixth sections in each township embrace or exclude mineral lands? Second. If the grant embraced the mineral lands, had the title of the state been divested by subsequent legislation? The majority of the court abstained from answering the first question, and decided the case by an affirmative answer to the second. My own opinion, as expressed in that case, was, and still is, that the grant contained in section seven of the enabling act took effect upon the admission of Nevada as a state, and that immediately thereupon the title to every sixteenth and thirty-sixth section within the territorial limits vested in the state, except where they had been disposed of by act of congress prior to the enabling act.

As the controversy in this case is between a claimant under the state and a claimant under the United States for a portion of a sixteenth section its decision, so far as I am concerned, must depend upon whether the land had been

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disposed of by act of congress prior to the passage of the enabling act. But fortunately this question admits of an easy answer. By the act of February 26, 1859 (Rev. Stat., sec. 2275), it is provided that "where settlements with a view to pre-emption have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler, and if they or either of them have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors," etc. The only question of construction affecting this case, which can arise upon the language of this act of congress is as to whether it applies to future settlements with a view to pre-emption, or only to those which had been made prior to its enactment. It seems, however, to be evident from the context that the intention of congress was to protect future settlers as well as those who had theretofore settled upon the reserved lands. As it is admitted that the appellant in this case had brought himself fully within the terms of the law, the only remaining question is whether the law is still operative in this state. Respondent contends that it was repealed by implication upon the passage of the enabling act, and the learned judge of the district court so decided in an able and elaborate written opinion which accompanies the record filed in this court. In this particular, however, I think the learned judge fell into an error. Repeals by implication are not favored, and are never held to have taken place where the two acts can stand together.

In this case I think there is no difficulty in so construing the act of February, 1859, and the enabling act, as to give to each its full force without impairing the force of the other. The grant in the enabling act expressly excepts lands previously disposed of by act of Congress, and appropriates other lands in lieu thereof. The act of 1859 was a prior disposition of all lands of the class described in the grant that might be settled upon before survey. There was,

Opinion of Beatty, J., concurring.

it is true, no absolute disposition of any particular section, but there was a contingent disposition of every section. The disposition was prior, notwithstanding it depended in particular instances upon a contingency which might happen subsequent to the grant.

The case of *Higgins v. Houghton* (25 Cal. 260), which is relied upon by the district judge as sustaining his conclusion that the effect of the passage of the enabling act was to withdraw the sixteenth and thirty-sixth sections from the operation of the pre-emption laws, is not in point for the reason that the grant to California was made prior to the passage of the act of February, 1859, while the grant to this state was made subsequently thereto; and the very object of that act was to protect pre-emption settlers, before survey, from the operation of grants to the states and territories of the public lands.

For these reasons I concur in the judgment and order of the court.

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2. **IDEM.**—The question of abandonment is one of intention. Whether it was the intention of the locators in the first notice to abandon their interest in the ground derived from said first notice of location, was a question of fact for the jury to determine from all the facts and circumstances of the case. *Id.*

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3. BILL OF EXCEPTIONS—REVIEW OF EVIDENCE.—There is no provision of the statute that will authorize this court to review or examine the evidence in a criminal case, unless it is embodied in a bill of exceptions. *State v. Larkin*, 314.
4. IDEM—REPORTERS' NOTES.—The reporters' notes of the proceedings of a trial can only be considered when adopted by the court as correct, and included in a bill of exceptions, settled and signed by the judge. *Id.*

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—Where the only objection made to the books of account, when offered in evidence, was that the defendant could not testify as to the entries in his books after the death of the party charged, and where the court, in deciding the case, held that said books were improperly kept, and excluded the entries in the books as evidence: *Held*, that inasmuch as the objection made was untenable, and the defendant never had any notice until after his motion for a new trial had been overruled, that the evidence he had relied upon had been rejected for any other reason than because it was deemed incompetent, a new trial should be granted. *Jones, Adm. of Estate of Jessup, v. Gammons*, 249.

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2. **CORPUS DELICTI—PROOF OF, HOW ESTABLISHED.**—Proof that defendant had in his possession, outside of the house, between twelve and one o'clock, goods which were in the house at nine o'clock, and which could only have been obtained by entering the house, was proof of an entry in the night-time, and, taken in connection with the other proof, completely established the *corpus delicti*. *Id.*

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1. **ENTIRE CHARGE OF THE COURT MUST BE CONSIDERED.**—The entire charge of the court must be considered, in determining the correctness of any portion of it, and if it clearly appears therefrom that no error prejudicial

- to defendant has been committed, the judgment will not be disturbed. *State v. Raymond*, 98.
2. **DEFINITION OF MALICE.**—Where the court gave the general definition of malice, instead of the legal definition: *Held*, that the legal definition is more comprehensive, and that if any error occurred, it was against the state and in favor of the defendant. *Id.*
 3. **CHARGE OF THE COURT—MURDER THE RESULT OF MALICE.**—The court, after giving the statutory definition of murder and manslaughter and the general definition of malice, charged the jury as follows: "From the foregoing, then, it will be seen that murder is the result of malice; manslaughter the result of sudden passion, heat of blood, anger, when the defendant is supposed not to be master of his own understanding:" *Held*, not erroneous. *Id.*
 4. **REASONABLE DOUBT.**—*Held*, that the charge of the court and instructions given in regard to reasonable doubt were as favorable to the defendant as the law would warrant. *Id.*
 5. **REMARKS OF THE COURT NOT EXCEPTED TO.**—Defendant claimed that the remarks made by the judge, in connection with his ruling upon a certain point, were erroneous: *Held*, that in order to present the question to this court it must appear that the remarks were excepted to at the time. By failing to make any objection, proceeding with the trial, and taking his chances of a verdict, the defendant waived the exception. *Gaudette v. Travis*, 149.
 6. **IDEM—ERROR—WHEN NOT IRREMEDIAL.**—If the ruling of the court is correct, the fact that a bad reason is given will not, in general, be treated as an error because it was uttered in the presence of the jury, and never ought to be deemed an irremediable error. The remedy of the party against whom the remarks are made, is by asking the court to give an instruction containing a correct statement of the rule or principle of law involved. *Id.*
 7. **CHARGE OF THE JUDGE UPON THE FACTS.**—An instruction of the court, assuming as a fact that A. was a creditor of B., where this was a fact in issue in the case, was clearly erroneous. *Id.*

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2. CONSTITUTIONALITY OF THE ACT INCORPORATING CARSON CITY.—The act incorporating Carson city (Stats. 1875, 87), is not in conflict with article III, or section 1 or 8 of article V, or section 10 of article XV of the Constitution. *State ex rel. Rosenstock v. Swift*, 128.
3. IDEM—APPOINTING POWER.—Under the Constitution of this State, the naming in the act of incorporation of the persons who were to constitute the provisional or initiary board of trustees was not the exercise of a power intrinsically executive. *Clarke v. Irwin* (5 Nev. 111), affirmed. *Id.*
4. IDEM—COUNTY OFFICERS EX OFFICIO CITY OFFICERS.—The legislature, in incorporating Carson city, had the power to constitute the designated county officers city officers, and to impose upon them the executive or ministerial duties of the municipality, corresponding to their respective duties as county officers. *Id.*
5. SECTION THREE OF ARTICLE ELEVEN OF THE CONSTITUTION CONSTRUED.—The provisions of section 3 of article XI of the Constitution providing that all fines collected under the penal laws of the State shall be pledged to educational purposes, has no application to fines recoverable for violations of city ordinances, but applies to fines recoverable under the general laws of the State. *Id.*, 129.
6. SECTION TWENTY-ONE OF ARTICLE FOUR OF THE CONSTITUTION.—The act incorporating Carson city is not in violation of the provisions of section twenty-one of article four of the Constitution, which declares, "Where a general law can be made applicable, all laws shall be general, * * * throughout the State." *Evans v. Job* (8 Nev. 323), affirmed. *Id.*
7. PART OF A STATUTE UNCONSTITUTIONAL.—When part of a statute is unconstitutional it will not authorize the court to declare the remainder void unless all the provisions are connected in subject-matter depending on each other. *Id.*

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1. CONTEMPT OF COURT—WHEN PROCESS IS CIVIL.—If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such case is not punitive, but coercive. *Phillips v. Welch*, 187.
2. *IDEM*—WHEN PROCESS IS CRIMINAL.—If the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. *Id.*
3. *IDEM*—APPELLATE JURISDICTION.—This court has no appellate jurisdiction in cases of contempt, where the proceeding is purely criminal. *Id.*
4. CONTEMPT OF COURT—REFUSAL TO ANSWER QUESTIONS.—If the witness refused to answer questions when the court decided he should answer, it was a contempt and punishable as such. The prisoner might have put himself upon his privilege not to criminate or degrade himself, but

he expressly disclaimed this excuse, and was therefore bound to answer the questions, or he was liable to be punished for contempt. *Mazurell v. Rives*, 214.

5. **CONTEMPT OF COURT—PENAL STATUTE.**—The statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions. *Id.*
6. **IDEM—JURISDICTION TO IMPOSE SENTENCE.**—Petitioner was asked a number of questions, all being addressed to the same point, which he refused to answer. The court found him guilty of a separate contempt for every question that he refused to answer: *Held*, that in refusing to answer, the petitioner was guilty of but one contempt, and that the court had jurisdiction to impose but one sentence. *Id.*

CONTINUANCE.

1. **CONTINUANCE OF CRIMINAL CASE FOR THE TERM—SECTION 2207 COMPILED LAWS.**—In construing section 582 of the criminal practice act: *Held*, that the fact that a disastrous fire had occurred destroying the courthouse, and so much of the city of Virginia as to render it impossible for the court to find a suitable room in which to meet was sufficient to authorize the court to continue the trial of causes for the term. *Ex parte Larkin*, 90.
2. **IDEM.**—Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a condition of affairs exists that is notorious, and about which, from its very nature, there could be no conflict, the court is authorized, of its own motion, to continue the causes for the term. (*Ex parte Stanley*, 4 Nev. 116, affirmed.) *Id.*

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1. **VERBAL CONTRACT AT STIPULATED PRICE PER DAY, PAYABLE MONTHLY, CONSTRUED.**—Where a foreman of a mine is employed at a stipulated price per day, to be paid monthly, and when he continues work for more than one year after his employment without any new agreement being made: *Held*, a contract from month to month that might have been terminated by either party at the end of the month without incurring any liability. *Capron v. Strout*, 304.
2. **IDEM—RIGHTS OF MORTGAGEE—NOTICE OF LIEN HOLDER.**—Where the mine-owner mortgaged the property subsequent to the contract with the foreman for labor: *Held*, that all the work done by the foreman subsequent to the execution of the mortgage, after the expiration of his then current month, was done under contracts made by him after legal notice of the mortgage, and his lien for such work is subordinate to the mortgage. *Id.*

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- POWER OF SECRETARY TO AFFIX CORPORATE SEAL.**—The secretary of a corporation is the proper custodian of the corporate seal, and when the secretary affixes it to a mortgage, or other instrument, the presumption

is, he did it by the direction of the corporation, and it devolves upon those who dispute the validity of the deed, to prove that he acted without authority. *Lee v. Evans*, 194.

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1. VERDICT CONTRARY TO EVIDENCE.—A verdict in a criminal case will not be reversed where there is any evidence to support it. *State v. Huff*, 17.
2. CROSS-EXAMINATION OF DEFENDANT.—When a defendant in a criminal case offers himself as a witness in his own behalf, he subjects himself to the same cross-examination that would be proper in the case of any other witness. *Id.*
3. IDEM.—Questions may be asked the witness which relate to his conduct and legitimately affect his credit for veracity. The defendant may, however, refuse to answer such questions. *Id.*
4. IDEM.—FREQUENT ASSAULTS AND BATTERIES.—No legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries. It could be inferred that he was a violent-tempered and perhaps a dangerous man, but not that he was a liar. *Id.*

5. **ERROR—WHEN PREJUDICIAL.**—*Held*, that the defendant was prejudiced by being compelled to answer questions addressed to him in relation to his conviction of former assaults and batteries. *Id.*
6. **SECTION 582 OF CRIMINAL PRACTICE ACT CONSTRUED.**—Section 582 of the criminal practice act (1 Comp L. 2207) is intended to prevent arbitrary, willful or oppressive delays; and whenever this appears to be the case, the defendant is entitled to be discharged. *Ex Parte Larkin*, 90.
7. **DEPOSITION OF PARTY CONFINED IN JAIL—ORDER OF JUDGE—SECTIONS 1459, 1460 AND 1461 CONSTRUED.**—The law requiring an affidavit to be made of certain facts before the court should make an order to have the party in jail produced in court, was never designed for the protection of the prisoner, but only to prevent improper and unnecessary interference with the custody of prisoners. *Maxwell v. Rives*, 214.
8. **IDEM.**—If the order for the prisoner's attendance in court was improvidently granted, it is no concern of the prisoner; being before the court, he was bound to answer any question that he would have been required to answer if the process for bringing him there had been strictly pursued. *Id.*
9. **PLEA OF FORMER ACQUITTAL—WHEN SHOULD BE ALLOWED.**—Where the defendant interposed a plea of former acquittal in the exact form prescribed by the statute (Comp. L. 1921): *Held*, that the court erred in refusing to allow the plea to be entered of record. *State v. Johnson*, 273.
10. **IDEM.**—It was not for the court to decide in advance that the plea of former acquittal could not be established. That issue was for the jury, subject, of course, to the right of the court to decide upon the competency and relevancy of the evidence offered in support of the plea. *Id.*
11. **PLEA OF FORMER JEOPARDY.**—*Held*, that although the plea of former jeopardy might have been superfluous, as the facts set out in it might possibly have been given in evidence under the general issue, or if not, then under the plea of former acquittal, it would have been better if the facts disclosed by it amounted to a defense, to allow it to be entered. *Id.*
12. **MOTIVE FOR COMMISSION OF CRIME.**—The prosecution has the right to offer any evidence tending to prove a motive for the commission of the crime. *State v. Larkin*, 315.
13. **CROSS-EXAMINATION OF A WITNESS.**—Every defendant in a criminal case is entitled to a full and perfect cross-examination of every witness who testifies against him. *Id.*
14. **IDEM.**—Where a witness for the prosecution had testified before a coroner's jury tending to exculpate the defendant, and on the trial testified to a different state of facts, and upon cross-examination refused to answer some of the questions asked by counsel as to what she had sworn to before the coroner's jury, giving as an excuse for not answering, that she was so intoxicated at that time that she did not know what she testified to: *Held*, that such refusal to answer did not authorize the court to strike out her testimony. *Id.*
15. **IDEM—REMARKS OF THE COURT.**—The court, in refusing to strike out the testimony, said in the presence of the jury: "I think the witness has answered all the questions, with the exception of some few matters as

- to her impeachment, and so far as that is concerned, I will relax the rule whenever it is desired to impeach her:" *Held*, that these remarks did not tend to prejudice the defendant. *Id.*
16. **CRIMINATING CIRCUMSTANCE—WEAPONS BELONGING TO DEFENDANT.**—Where the pistol with which the crime was committed belonged to defendant, and was found in defendant's bed-room shortly after the homicide: *Held*, that these facts tended to establish one link in the chain of circumstantial evidence, and the court was not authorized to withdraw its consideration from the jury. *Id.*
 17. **IDEM.**—The fact that other parties had access to defendant's bed-room might have the tendency to weaken the force of this link in the chain of evidence, but it would not, of itself, destroy it. *Id.*
 18. **EXCITEMENT AND PREJUDICE OF BYSTANDERS.**—The defendant claimed that his case was prejudiced by the action of the bystanders, during the argument of the district attorney, by clapping their hands, stamping the floor and benches, etc. The affidavits produced by the state show that the spectators but once evinced a desire to applaud the district attorney, and the court immediately suppressed the manifestation: *Held*, that defendant's case was not improperly prejudiced, and that the court did not err in refusing a new trial. *Id.*
 19. **INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE—DEGREE OF CERTAINTY.**—The court gave this instruction: "If you believe the evidence given in this case, in order to convict the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt." *Held*, correct. *State v. Nelson*, 334.
 20. **REASONABLE DOUBT—ENTIRE SATISFACTION.**—The court in instructing the jury in regard to reasonable doubt, uses the following language. "And if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be entirely satisfied that the defendant and no other person committed the alleged offense:" *Held*, not erroneous. *Id.*
 21. **IDEM.**—If a man believes that a defendant may possibly be innocent, he cannot be said to be "entirely satisfied" of his guilt, and yet he may be satisfied of it beyond a reasonable doubt, and may convict. *Id.*
 22. **REASONABLE DOUBT.**—Where the court, in defining reasonable doubt, gave this instruction: "By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life:" *Held*, erroneous. *State v. Millain*, 3 Nev. 481, overruled. *State v. Rover*, 343.
 23. **MOTION IN ARREST OF JUDGMENT.**—A motion in arrest of judgment can only be sustained upon the ground that the court has no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a public offense. (1 Comp. L., 1918.) *State v. O'Connor*, 416.

24. ASSAULT WITH INTENT TO KILL. — The statute of 1873 embraces the crime of an assault with intent to kill in all cases where the killing, if effected, would be unlawful. *Id.*
- REVIEW OF EVIDENCE IN CRIMINAL CASES. (See Bill of Exceptions, 3.) 314.
- BURGLARY—SECTION 2365 OF COMPILED LAWS CONSTRUED. (See Burglary, 1.) 30.
- CORPUS DELICTI—PROOF OF, HOW ESTABLISHED. (See Burglary, 2.) 30.
- ENTIRE CHARGE OF THE COURT MUST BE CONSIDERED. (See Charge, 1.) 98.
- DEFINITION OF MALICE—CHARGE OF THE COURT. (See Charge, 2, 3.) 98.
- REASONABLE DOUBT. (See Charge, 4.) 98.
- CONTEMPT OF COURT—WHEN PROCESS IS CRIMINAL. (See Contempts, 1, 2.) 187.
- CONTINUANCE OF CRIMINAL CASE FOR THE TERM. (See Continuance, 1, 2.) 90.
- DEPOSITION OF PARTY CONFINED IN JAIL. (See Deposition, 1.) 213.
- DRUNKENNESS OF DEFENDANT. (See Drunkenness, 1.) 416.
- EMBEZZLEMENT—SECTION 2380 COMPILED LAWS CONSTRUED—INDICTMENT AND BURDEN OF PROOF. (See Embezzlement, 1-5.) 287.
- CHALLENGE TO GRAND JURORS, RIGHTS OF DEFENDANT. (See Grand Jurors, 1, 2.) 314.
- COMMITMENTS FOR EMBEZZLEMENT AND OBTAINING MONEY UNDER FALSE PRETENSES. (See Habeas Corpus, 2.) 287.
- SUPREME COURT HAS AUTHORITY TO ISSUE COMMITMENTS IN CERTAIN CASES. (See Habeas Corpus, 3.) 287.
- SECTIONS 581 AND 582 OF THE CRIMINAL PRACTICE ACT CONSTRUED. (See Habeas Corpus, 4.) 295.
- DISCHARGE OF DEFENDANT WHEN THERE HAS BEEN A LEGAL JEOPARDY. (See Habeas Corpus, 11.) 429.
- INSTRUCTIONS RELATING TO HOMICIDE AND MURDER. (See Homicide, 1-5.) 98.
- INDICTMENT FOR MURDER. (See Indictment, 1-4; 10-12.) 17, 98, 314, 416.
- INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY. (See Indictment, 6, 7.) 334.
- JEOPARDY—WHEN IT ATTACHES. (See Jeopardy, 1-4.) 428.
- JURY LAW OF 1875 HELD UNCONSTITUTIONAL. (See Jury, 2, 14.) 39, 148.
- CHALLENGE TO JURORS FOR ACTUAL AND IMPLIED BIAS. (See Jury, 4-7; 9-12.) 39, 99.
- DEFENDANT INDICTED FOR A MISDEMEANOR—WHEN MAY BE TRIED BY A LESS JURY THAN 12. (See Jury, 11.) 119.
- POWER OF COURT TO DISCHARGE A JURY BEFORE VERDICT. (See Jury, 22.) 429.
- SUDDEN HEAT OF PASSION. (See Manslaughter, 1.) 98.
- MISDEMEANOR IN OFFICE OF PUBLIC ADMINISTRATOR. (See Office and Officer, 1-3.) 119.
- ATTEMPT TO COMMIT RAPE—CONSENT OF FEMALE. (See Rape.) 255.

CRIMINAL PRACTICE ACT.

- Section 235. Indictment, 421.
- Section 239. Indictment, 421.
- Section 276. Challenge to Grand Juror, 325.
- Sections 323-4. Challenge to Panel of Jurors, 106.
- Section 340. Challenge for Implied Bias, 106.
- Section 342. Grounds of Challenge, 106.
- Sections 387-8. Instructions, 425.
- Sections 396-7. Discharge of Jury, 435.
- Section 421. Challenge to Juror, 325.
- Section 423. Bill of Exceptions, 24, 322.
- Section 424. Bill of Exceptions, 322.
- Sections 429, 436, 444, 445, 450. Bill of Exceptions, 24.
- Section 450. Minutes of the Trial, 321.
- Section 581. When Indictment should be dismissed, 297.
- Section 582. Defendant discharged from Indictment, 91.
- Section 582. Speedy Trial, 433.
- Section 583. When Defendant should be discharged on his own
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DAMAGES.

EXEMPLARY DAMAGES. (See Railroads, 2.) 350.

MEASURE OF DAMAGES WHERE PASSENGER IS WRONGFULLY EJECTED FROM A
RAILROAD CAR. (See Railroads.) 350.

DEED.

1. DEED OF MINING GROUND—DESIGNATION OF THE NAME OF THE CLAIM.—
Where a party conveys all his right, title and interest in and to certain
mining ground and quartz lode described in the deed, and it appears as
a fact that his interest was derived from two different notices of location
which were posted upon and claimed the same lode: *Held*, that the con-
veyance of his interest in the lode necessarily conveyed his interest
under both locations, and it was immaterial by what particular name
he designated it. (*Phillips v. Blasdel*, 8 Nev. 61, affirmed); *Weill v.*
Lucerne M. Co., 201.
2. IDEM—HOW CONSTRUED.—Where the language of a deed admits of but
one construction, and the location of the lode or premises intended to
be conveyed is clearly ascertained by a sufficient description of the
ground in the deed, by courses, distances, or monuments, it cannot be
controlled by any different exposition derived from the acts of the par-
ties in locating the premises, or from the failure of the grantor to
designate the various names by which the ground conveyed was at dif-
ferent times known. *Id.*

CERTIFICATE OF ACKNOWLEDGMENT. (See Evidence, 4.) 194.

DEFINITIONS.

- MEANING OF WORDS "PUBLIC USE." (See Eminent Domain, 4.) 394.
- "GAMING" AND "GAMBLING" SYNONYMOUS. (See Gaming, 1.) 69.
- MEANING OF THE WORDS "FAMILY OF THE DECEASED." (See Homestead, 2.) 260.
- MEANING OF WORDS "TRIAL BY JURY." (See Jury, 3.) 39.
- MEANING OF THE WORDS "MINUTES OF THE TRIAL." (See Minutes of the Trial, 1.) 314.
- "CITIZEN OF ANOTHER STATE" MAY BE A CORPORATION. (See Removal of Causes, 2.) 350.

DELIVERY.

1. POSSESSION AND DELIVERY OF PERSONAL PROPERTY.—A delivery of personal property is nothing except a voluntary transfer of the possession from one person to another. *Gaudette v Travis*, 149.
2. *IDEM*—SYMBOLICAL DELIVERY NOT REQUIRED.—Formal or symbolical acts are sometimes admitted *ex necessitate* to be sufficient to constitute a delivery, but they are not required when the substantial thing has been done, of which they are merely a sign. *Id.*

(See Instructions, 4.) 149.

DELIVERY AND CHANGE OF POSSESSION OF PERSONAL PROPERTY. (See Sale, 2, 5.) 268-377.

DEPOSITION.

DEPOSITION OF A PARTY CONFINED IN JAIL.—A party to a civil action has the right to take the deposition of his adversary whether he is in or out of jail. *Mazwell v. Rives*, 213.

ORDER OF THE JUDGE. (See Criminal Law, 7.) 214.

DISCRETION.

SETTING CAUSES FOR TRIAL DURING THE TERM IS WITHIN THE DISCRETION OF THE COURT. (See Habeas Corpus, 1.) 90.

SUBMITTING CRIMINAL CASE TO ANOTHER GRAND JURY, WHEN WITHIN THE DISCRETION OF THE JUDGE. (See Habeas Corpus, 5, 6.) 295.

DRUNKENNESS.

INSTRUCTIONS—DRUNKENNESS OF DEFENDANT.—Upon reviewing the instructions given and refused by the court, relating to the question of defendant's intoxication: *Held*, that the instructions given on this point were more favorable to the defendant than those which were refused. *State v. O'Connor*, 416.

ELECTION.

1. **CONTESTED ELECTION.**—The contest for members of the legislature can only be made in pursuance of the provisions of the statute. (2 Comp. L. 2555 to 2560, inclusive.) The proceedings are special, and under our statute the courts have no jurisdiction. *Garrard v. Gallagher*, 382.
2. **IDEM—SPECIAL REMEDY.**—Where the statute gives a special remedy it must be followed, and the proceedings thereunder in contested election cases are substantially different from any common law remedy. *Id.*
3. **IDEM—COSTS.**—In special proceedings, costs will not be allowed except by legislative action. Nor will fees be given to the officers by the courts unless specially provided for by the statute. *Id.*
4. **IDEM—REMEDY WHERE FOUND.**—As there is no provision made for the fees of officers, or costs expended in a contest for members of the legislature, the remedy is left entirely to the discretion of the legislature. *Id.*

EMBEZZLEMENT.

1. **EMBEZZLEMENT—SECTION 2380 COMPILED LAWS CONSTRUED**—In construing section 2380 of the compiled laws: *Held*, that money received by a clerk who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer. *Ex parte Ricord*, 287.
2. **IDEM.**—Petitioner was an assistant of the agent of the Central Pacific Railroad Company, and had been held out to the public by the agent as having authority to collect bills, and was enabled, by reason of the trust reposed in him by the company, to collect the company's money and discharge its debtors from their obligation to the company: *Held*, that although he had no general authority to collect all bills due the company, he was, under the circumstances, intrusted by the company with the money which he collected. *Id.*
3. **IDEM.**—It does not lie in the mouth of petitioner to deny that he had the authority which he claimed in order to collect the money, and which the confidence reposed in him by his employer enabled him to claim with success. *Id.*
4. **INDICTMENT FOR EMBEZZLEMENT.**—A clerk may commit more than one embezzlement of his employer's money, and if he does he may be separately indicted for each separate offense. *Id.*
5. **IDEM.—BURDEN OF PROOF.**—If the money from different parties was all collected before any portion of it was converted, then petitioner committed but one offense; but the burden of establishing this fact is upon petitioner. *Id.*

EMINENT DOMAIN.

1. **EMINENT DOMAIN—PUBLIC USE.**—When the legislative power of appropriation of the private property of a citizen is attempted to be exercised, the true test of its validity is, whether or not the use for which the property is to be appropriated is a "public use," within the meaning of

- these words as used in section 8, article 1, of the State Constitution. *Dayton G. & S. M. Co. v. Seawell*, 394.
2. **IDEM—DECISION OF LEGISLATURE NOT FINAL.**—The declaration by the legislature that the purposes named in the act are "to be for the public use, and the right of eminent domain may be exercised therefor," is not conclusive upon the courts. *Id.*
 3. **IDEM—DOUBTFUL CONSTRUCTION.**—Although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the State government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail. *Id.*
 4. **EMINENT DOMAIN—MEANING OF THE WORDS "PUBLIC USE".**—In construing the meaning of the words "public use," as contained in the Constitution of this State: *Held*, that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use. *Id.*
 5. **IDEM—NECESSITY MUST EXIST.**—The object for which private property is to be taken must not only be of great public benefit and for the paramount-interests of the community, but the necessity must exist for the exercise of the right of eminent domain. *Id.*
 6. **IDEM—WHEN THE POWER CAN BE EXERCISED.**—The exercise of the power of eminent domain, even for uses confessedly for the public benefit, can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation to the citizen whose property is to be taken. *Id.*

ERROR.

WHEN ERROR NOT PREJUDICIAL.—The evidence being clear that A. was a creditor, and it appearing that if that question had been submitted to the jury as a special issue, and they had found otherwise, it would have been the duty of the court to set aside the verdict: *Held*, that under such circumstances, the inadvertent assumption of the fact by the court was not such an error as justified a reversal of the case. *Gaudette v. Travis*, 149.

ENTIRE CHARGE OF THE COURT MUST BE CONSIDERED. (See Charge, 1.) 98.

ERROR WHEN NOT IRREMEDIAL. (See Charge, 6.) 149.

CROSS-EXAMINATION OF DEFENDANT. (See Criminal Law, 5.) 17.

REFUSAL OF INSTRUCTIONS, WHEN NOT ERRONEOUS. (See Instructions, 8.) 416.

EVIDENCE.

1. **CONFLICT OF EVIDENCE—NEW TRIAL.**—The rule laid down in *Treadway v. Wilder* (9 Nev. 70), as to the weight of evidence on motion for new trial, affirmed. *Margaroli v. Milligan*, 96.

2. VERDICT CONTRARY TO EVIDENCE.—This court will not reverse a judgment in a criminal case on the ground that the verdict is contrary to the evidence, when there is any evidence to support it. *State v. Raymond*, 98.
3. SECONDARY EVIDENCE—WHEN ADMISSIBLE.—Where the proof shows that the instrument which plaintiff wishes to produce in evidence is out of his power to obtain, and is beyond the reach of the process of the court, secondary evidence of its existence and contents is admissible without regard to the provisions of the recording act. *Erans v. Lee*, 194.
4. CERTIFICATE OF ACKNOWLEDGMENT OF DEED.—A certificate of the vice-consul general of the United States at London, under his official seal, is *prima facie* evidence of the execution of a deed. *Id.*
5. FOREIGN CORPORATIONS—ACT OF MARCH 3, 1869, (STAT. 69, 115), CONSTRUED.—The intention of the act requiring all foreign corporations to file, in the office of the county recorder, an authenticated copy of their certificate, or act of incorporation, etc., was obviously to compel such corporations, when doing business in this State, to furnish easily accessible evidence of their existence, and of the names of their officers. *Id.*
6. IDEM.—Where a paper was filed by the corporation, under said act: *Held*, That the corporation, and those claiming under it, are precluded from objecting to the contents of the paper, as at least *prima facie* evidence, upon the ground that it does not come up to the requirements of the law. *Id.*
7. IDEM—SKAL.—*Held*, That as the paper on file bears the impression of the corporate seal, *prima facie*, it proves the seal of the corporation. *Id.*
8. PRESUMPTIONS IN FAVOR OF THE RULINGS OF THE COURT. — Where the court overruled the objections made by defendant to the admission of certain evidence, and there was nothing in the record to show whether the evidence was relevant or material: *Held*, that the presumption is that the evidence was properly admitted. *State v. Rover*, 343.
9. IRRELEVANT TESTIMONY — WHEN SHOULD BE STRICKEN OUT.—Where no objection is made to any question asked a witness, if the answer is not responsive to the question or not relevant to the issues presented, the opposing party should move to strike it out. *Leport v. Sweeney*, 337.
10. IDEM—TESTIMONY NOT PREJUDICIAL.—*Held*, that under the facts recited in the opinion, the defendant was not prejudiced by the answer of the witness that he cut "all the wood on the land that would roll into the cañon," as under the findings this question was wholly immaterial.
11. INSUFFICIENCY OF EVIDENCE TO SUPPORT THE FINDINGS.—Where it appears to this court that there is as much evidence to support the findings in every particular as there is to oppose the findings in any particular: *Held*, that this court will not disturb the judgment of the lower court. *Id.*
12. RES GESTÆ.—Remarks made in the presence of a party concerning his own conduct are often material facts when his conduct becomes the subject of investigation, and are admissible in evidence as a part of the *res gestæ*. *State v. O'Connor*, 416.

- REVIEW OF EVIDENCE IN CRIMINAL CASES. (See Bill of Exceptions, 3.) 314.
- CORPUS DELICTI—PROOF OF, HOW ESTABLISHED. (See Burglary, 2.) 30.
- COUNTER-CLAIM MUST BE ESTABLISHED BY PREPONDERANCE OF EVIDENCE. (See Counter-claim, 1.) 96.
- VERDICT CONTRARY TO EVIDENCE. (See Criminal Law, 1.) 17.
- CROSS-EXAMINATION OF DEFENDANT. (See Criminal Law, 2-5.) 17.
- PLEA OF FORMER ACQUITTAL. (See Criminal Law, 9-10.) 273.
- PLEA OF FORMER JEOPARDY. (See Criminal Law, 11.) 273.
- CROSS-EXAMINATION OF WITNESSES. (See Criminal Law, 13-14.) 315.
- CRIMINATING CIRCUMSTANCES, WEAPONS BELONGING TO DEFENDANT. (See Criminal Law, 16-17.) 315.
- CIRCUMSTANTIAL EVIDENCE—DEGREE OF CERTAINTY. (See Criminal Law, 19-21,) 334.
- EMBEZZLEMENT—BURDEN OF PROOF. (See Embezzlement, 5.) 287.
- WHEN ERROR IS NOT PREJUDICIAL. (See Error.) 149.

FRAUD.

- FRAUD, HOW ESTABLISHED—BURDEN OF PROOF.—Proof of fraud was part of the defendant's case, but proof of the consideration was part of the plaintiff's case; to prove the amount of the consideration was not to prove fraud. Inadequacy of consideration is an element of fraud in some cases, and the burden of proving it in this case was on the defendant, but he had a right to know what the amount of the consideration was before offering proof that it was inadequate. *Chamberlain v. Stern*, 268.
- PLEADINGS ALLEGING FRAUD (see Pleadings 1, 2), 268.

GAMING.

- "GAMING" AND "GAMBLING."—These words are defined and treated as synonymous. *Evans v. Cook*, 69.

GRAND JURORS.

1. CHALLENGE TO GRAND JURORS—RIGHTS OF DEFENDANT.—The defendant was indicted at the October term, 1875. The grand jury for the January term, 1876, was impaneled February 2, 1876. The indictment found at the October term was dismissed February 21, 1876. On the first day of March, the grand jury found another indictment. The defendant during the whole of this time was confined in the county jail. *Held*, That at the time the grand jury was impaneled (February 2, 1876) defendant was not held to answer before it for any offense. *State v. Larkin*, 314.
2. IDEM—REFUSAL OF DEFENDANT TO EXERCISE CHALLENGE.—Where the defendant had the privilege after the indictment was found, under the

ruling of the court as well as by virtue of the provisions of section 276 of the criminal practice act, to move to set aside the indictment on any ground which would have been good ground of challenge either to the panel, or any individual grand juror, and refused to exercise the privilege: *Held*, that he is not in a position to complain of the ruling of the court in refusing to set aside the indictment. *Id*.

GUARDIANSHIP.

1. **APPOINTMENT OF GUARDIAN—INTEREST OF MINOR.**—In the appointment of a guardian the interest of the minor is the paramount consideration. The parental request is entitled to great weight, and ought to prevail unless good reason to the contrary be shown. *Badenhoof v. Johnson*, 87.
2. **IDEM—HOW MADE.**—The district judge has no authority to appoint any person guardian of the person or estate of a minor except upon a written petition in his behalf and after notice of his application. *Id*.

HABEAS CORPUS.

1. **SETTING CAUSES FOR TRIAL DURING THE TERM.**—The regulation of the business of the term is a matter exclusively within the control of the judge, and cannot be interfered with by this court upon a writ of habeas corpus. *Ex parte Larkin*, 90.
2. **COMMITMENTS FOR EMBEZZLEMENT AND OBTAINING MONEY UNDER FALSE PRETENSES.**—Where petitioner was held by the sheriff under a commitment of a justice of the peace for embezzlement, and while so held was taken before the district judge upon habeas corpus, and the district judge, after hearing further testimony, made an order committing him to the custody of the sheriff for the offense of obtaining money under false pretenses: *Held*, that the order of the district judge did not, *ipso facto*, discharge petitioner from further custody under the warrant for embezzlement. *Ex parte Ricord*, 287.
3. **IDEM—SUPREME COURT HAS AUTHORITY TO ISSUE COMMITMENT.**—Where a petitioner is brought before the Supreme Court upon a writ of habeas corpus, the court is authorized, if after examining the case it should be of opinion that petitioner was guilty of an offense other than that held, to issue a new commitment. *Id*.
4. **HABEAS CORPUS, SECTIONS 581 AND 583 CRIMINAL PRACTICE ACT CONSTRUED.**—Where petitioner had been held to answer before the grand jury for the crime of murder, the grand jury had met and ignored the charge, and the court, upon sufficient cause shown, ordered that he be held to appear before the next grand jury: *Held*, that petitioner was not entitled to his discharge under the provisions of sections 581 and 583 of the Criminal Practice Act (1 Comp. L. 2206, 2208) upon a writ of habeas corpus. *Ex parte Isbell*, 295.
5. **IDEM—ORDER SUBMITTING CASE TO ANOTHER GRAND JURY—DISCRETION OF JUDGE.**—Where it appears that the court adjudicated upon the facts, the presumption arises that the facts were of such a character as to warrant the court in the exercise of its sound legal discretion to make the order. *Id*.

6. **IDEM—RECITALS IN RECORD.**—It being recited in the record that the order resubmitting the case to the next grand jury, was made because "sufficient cause" was shown, the presumption is, in the absence of any showing to the contrary, that the court did not act arbitrarily in the premises. *Id.*
7. **HABEAS CORPUS, WHEN WRIT SHOULD NOT ISSUE.**—When it appears from the facts set out in the petition, that there is no sufficient ground to grant the relief asked for, the writ should not be issued. *Id.*
8. **ADMISSION TO BAIL UPON CHARGE OF MURDER.**—A *nisi prius* court has the right, upon the application of a petitioner, who is charged with murder, and whose case has been resubmitted to another grand jury, to hear the testimony and decide for itself whether the proof of defendant's guilt was evident, or the presumption great. *Id.*
9. **IDEM—APPLICATION TO OTHER COURTS.**—When it appears that the presiding judge has acted upon petitioner's application for bail, no other court or judge would be warranted in discharging petitioner or admitting him to bail, unless it clearly appeared that the presiding judge had acted arbitrarily in the premises. *Id.*
10. **HABEAS CORPUS.**—The writ of habeas corpus is not intended to have the force or operation of an appeal, writ of error, or certiorari; nor is it designed as a substitute for either. *Ex parte Maxwell*, 429.
11. **IDEM—DISCHARGE OF DEFENDANT.**—Where there has been a legal jeopardy, it is equivalent to a verdict of acquittal; and, on motion, the prisoner is entitled to his discharge; but the writ of habeas corpus will not lie. *Id.*

HOMESTEAD.

1. **HOMESTEAD—SECTION 123 OF THE PROBATE ACT CONSTRUED.**—The expression in section 123, "may set apart for the use of the family of the deceased," must be considered as imperative and mandatory as if it had read, *shall set apart*. *Estate of Valley*, 260.
2. **IDEM—SECTION 126 CONSTRUED.**—By section 126, the legislature intended to embrace within the meaning of the words "family of the deceased," a childless widow. *Id.*
3. **HOMESTEAD UNDER HOMESTEAD ACT.**—Under the homestead act, the homestead is exempted from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter whether the debts were contracted before or after the family relation commenced, or before or after the homestead was dedicated. *Id.*
4. **IDEM—PROBATE ACT.**—Under the probate act the homestead is exempted in favor of the widow or minor child or children of a deceased person, from the payment of the general debts contracted by him in his lifetime, and from debts accruing in the course of administration. *Id.*
5. **IDEM.**—To claim the homestead under the homestead law, the widow would have to show that she was the head of a family. *Id.*
6. **ABANDONMENT OF HOMESTEAD.**—The only effect of a written abandonment of the homestead was to invest the husband with the power to alienate

the premises or to subject them to some specific lien during the continuance of the abandonment. *Id.*

HOMESTEAD ACT OF 1865, REPEAL OF STATUTES BY IMPLICATION. (See Statutes, 8.) 260.

HOMICIDE.

1. **HOMICIDE—NOT JUSTIFIED BY PROVOCATION.**—The court charged the jury: "No provocation can justify or excuse homicide, but may reduce the offense to manslaughter. Words or actions, or gestures, however grievous or provoking, unaccompanied by an assault, will not justify or excuse murder; and when a deadly weapon is used, the provocation must be great to make the crime less than murder." *Held*, correct. *State v. Raymond*, 98.
2. **MURDER IN THE FIRST DEGREE.**—The court charged the jury as follows: "If the jury believe, from the evidence, that the defendant did, with malice aforethought, willfully, deliberately, and premeditatedly assault the man Mooney, with the intent then and there to kill him, and while so engaged did kill the man Twiggs, then you will find the defendant guilty of murder in the first degree:" *Held*, correct. *Id.*
3. **MURDER IN THE SECOND DEGREE.**—The court said in its charge: "If the jury believe * * * that the defendant did, with malice aforethought, but without willful, deliberate premeditation, assault the man Mooney, with the intent then and there to do him great bodily harm, and while so engaged did kill the man Twiggs, you will find the defendant guilty of murder in the second degree:" *Held*, correct. *Id.*
4. **UNLAWFUL ACT.**—The court charged the jury as follows: "If the jury believe from the evidence that the defendant assaulted the man Mooney with a pistol loaded with powder and leaden balls, and while so doing, did fire off the said pistol at or upon said Mooney, then he was in commission of an act which in its consequences naturally tends to destroy human life, and was unlawful, unless you find he was justified or excusable in so doing:" *Held*, that when taken in connection with the other instructions defining murder, justifiable and excusable homicide and self-defense, it is not erroneous. *Id.*
5. **IDEM.**—The court further charged the jury: "If you believe from the evidence that the defendant was engaged in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or was in the prosecution of a felonious intent, and while so engaged killed the man Twiggs, you will find the defendant guilty of murder:" *Held*, that when considered with the other portions of the charge, it is not erroneous. *Id.*

ADMISSION TO BAIL UPON CHARGE OF MURDER. (See Habeas Corpus, 8, 9.) 295.

INDICTMENT.

1. **INDICTMENT—WHEN DEFECTIVE.**—An indictment for murder which fails to show that the death occurred within a year and a day after the perpetration of the act which produced it, fails to state the requisite facts to constitute a complete offense. *State v. Huff*, 17.

2. **IDEM—OBJECTIONS TO FORM WAIVED BY FAILURE TO DEMUR.**—*Held*, that the defect, above stated, was waived by the failure of defendant to demur to the indictment. *Id.*
 3. **IDEM—ALLEGATION OF KILLING.**—When it is alleged that the defendant, on a certain day and year, etc., "killed" the deceased, it is to be implied that the act which produced the death and the death occurred on the same day. *Id.*
 4. **INDICTMENT FOR MURDER.**—An indictment for murder, drawn in the approved form of the common law, *held* sufficient. *State v Raymond*, 98.
 5. **INDICTMENT FOR MURDER.**—*Held* sufficient. *State v. Larkin*, 614.
 6. **INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY.**—In an indictment for robbery from a stage-coach, of property belonging to Wells, Fargo & Co., the ownership of the property may be laid in the driver of the coach. *State v. Nelson*, 334.
 7. **IDEM.**—The essential averment is that the property did not belong to the defendant. *Id.*
 8. **IDEM—DIFFERENT COUNTS.**—Where there are two counts in the indictment, one alleging the property in the driver of the coach, and the other averring that the property belonged to Wells, Fargo & Co.: *Held*, that the district attorney was not bound to make an election and confine himself to one count of the indictment. *Id.*
 9. **IDEM—RIGHT OF DEFENDANT.**—*Held*, that inasmuch as the defendant had no right to demand an election between the counts in the indictment in the first place, that he had no right to insist upon a voluntary election made by the district attorney, unless in consequence of reliance upon such election being adhered to, he had done or omitted to do something by which he would have been prejudiced. *Id.*
 10. **INDICTMENT—TIME OF COMMISSION OF OFFENSE.**—The indictment charges: "That on the twenty-third day of February, A. D. 1876, or thereabouts, at the county of Storey, * * * without authority of law, and with malice aforethought, with a deadly weapon, to wit, a knife, the said George O'Connor then and there being armed, did, without authority of law, and with malice aforethought, make an assault in and upon one John Winn, with intent to kill him, the said John Winn," etc.: *Held*, that the time when the offense was committed is alleged with sufficient certainty. *State v. O'Connor*, 416.
 11. **IDEM.**—The words "and before the finding of this indictment," after the date alleged, though proper, need not necessarily be inserted in an indictment. *Id.*
 12. **IDEM—STATEMENT OF OFFENSE CHARGED.**—*Held*, that the indictment clearly charges an assault with a knife—a deadly weapon—with intent to kill. *Id.*
- BURGLARY—SUFFICIENCY OF INDICTMENT.** (See Burglary, 1.) 30.
- INDICTMENT FOR EMBEZZLEMENT.** (See Embezzlement, 4.) 287.

INJUNCTION.

WHEN INJUNCTION WILL NOT ISSUE TO RESTRAIN COLLECTION OF TAX. (See Taxes, 1, 2, 3.) 161.

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INSTRUCTIONS.

1. REMARKS OF THE COURT.—It is not trenching upon the province of the jury to say that evidence has been given tending to establish a fact which it clearly does tend to establish. *State v. Watkins*, 30.
2. INSTRUCTIONS.—An instruction that if defendant entered the house and stole therefrom certain goods, it might be inferred that he entered with intent to steal: *Held*, correct. *Id.*
3. MODIFICATION OF INSTRUCTIONS.—The court is authorized to modify instructions so as to relieve them of any possible ambiguity, and to make their meaning more certain. *Id.*
4. DELIVERY OF PERSONAL PROPERTY—INSTRUCTIONS.—If the defendant desired to have the jury consider the question of delivery it was his duty to have prepared, and asked the court to give, an instruction upon the point. *Gaudette v. Travis*, 149.
5. MODIFICATIONS OF INSTRUCTIONS.—The court is authorized to modify and change an instruction offered by counsel, even if correct as an abstract proposition of law, when it is calculated to mislead the jury. *Id.*
6. INSTRUCTIONS OF THE COURT—BILL OF EXCEPTIONS.—Instructions given by the court of its own motion will not be considered unless embodied in a bill of exceptions. *State v. Rover*, 343.
7. REASONABLE DOUBT.—Where the court, in defining reasonable doubt, gave this instruction: "By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life:" *Held*, erroneous. (*State v. Millain*, 3 Nev. 481. Overruled.) *Id.*
8. REFUSAL OF INSTRUCTIONS—WHEN NOT ERRONEOUS.—It is not error to refuse an instruction which has already been given in substance, and in terms as clear, full, and favorable to the defendant as those in which the court is asked to repeat it. *State v. O'Connor*, 416.

ENTIRE CHARGE OF THE COURT MUST BE CONSIDERED. (See Charge, 1.) 98.

DEFINITION OF MALICE. (See Charge, 2, 3.) 98.

REMARKS OF THE COURT—WHEN INSTRUCTIONS SHOULD BE GIVEN. (See Charge, 5, 6.) 149.

INSTRUCTION OF JUDGE UPON THE FACTS. (See Charge, 7.) 149.

CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT AND ENTIRE SATISFACTION. (See Criminal Law, 19-21.) 334.

DRUNKENNESS OF DEFENDANT. (See Drunkenness, 1.) 416.

HOMICIDE AND MURDER. (See Homicide, 1-5.) 98.

JEOPARDY.

1. JEOPARDY—WHEN IT ATTACHES.—Whenever the accused has been placed upon trial, upon a valid indictment before a competent court, and a jury duly impaneled, sworn and charged with the case his jeopardy attaches, and the discharge of the jury before verdict, unless with the consent of

- the defendant, or the intervention of some unavoidable accident or some overruling necessity, operates as an acquittal. *Ex parte Maxwell*, 428.
2. **IDEM—JURY FAILING TO AGREE.**—The inability of the jury to agree upon a verdict is recognized as creating a necessity that justifies the discharge of the jury. *Id.*
 3. **WHEN JEOPARDY DOES NOT ATTACH.**—Whenever a trial has commenced, whether for misdemeanor or felony, and the judge discovers any imperfection which will render a verdict void or voidable by him, he may stop the trial and what has been done will be no impediment in the way of any future proceedings. *Id.*
 4. **IDEM.**—Whenever anything appears showing plainly the fact that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist, and on making the adjudication matter of record, stop the trial, with the result above stated. *Id.*

PLEA OF FORMER JEOPARDY. (See Criminal Law, 11.) 273.

LEGAL JEOPARDY EQUIVALENT TO A VERDICT OF ACQUITTAL. (See Habeas Corpus, 11.) 429.

JUDGMENT.

1. **JUDGMENT, ENTRY OF.**—Where a defendant is severally liable, a separate judgment against him may be entered upon his default, leaving the action to proceed against his co-defendants. *Evans v. Cook*, 69.
2. **JUDGMENT BY DEFAULT—EXCUSABLE NEGLECT.**—Cook signed the undertaking upon which he sued, upon the representation of Hanley that the sole consideration of the note declared upon in the attachment suit was a gambling debt, that he (H.) could and would defend the action on that ground; that H., instead of defending the action, and by collusion with the plaintiff for the purpose of cheating and defrauding C., suffered a judgment to be taken against him; that H. frequently represented to C. that the matter was settled and that he need not trouble himself about it, etc.; that he was actually induced by these representations, made by procurement of the plaintiff, to neglect to file his answer in time. *Held*, that this was excusable neglect. *Id.*
3. **FOREIGN JUDGMENT—JURISDICTION NEED NOT BE ALLEGED.**—In bringing suit upon a judgment recovered in a sister State it is not necessary to allege in the complaint that the court in which the judgment was rendered, had jurisdiction either of the subject-matter of the action, or of the defendant. Want of jurisdiction is matter of defense. *Phelps v. Duffy*, 80.
4. **IDEM—PRACTICE ACT.**—If section 59 of the practice act applies to foreign judgments, then the complaint is sufficient in this case, for the reason that it conforms to the provision of this section. *Id.*
5. **FORM OF JUDGMENT.**—The sufficiency of the writing claimed to be a judgment, should always be tested by its substance rather than its form. *Humboldt M. & M. Co. v. Terry et al.*, 237.
6. **IDEM—JUDGMENT OF CONFESSION.**—Where a statement and affidavit of confession authorizing the entry of judgment was filed with the clerk

- and the clerk copied the statement and affidavit in the judgment book, and added: "Judgment entered April 14, A. D. 1874: Attest, J. H. Job, clerk;" and indorsed the same on the back of the statement: *Held*, that this constitutes a valid judgment. (*Beatty, J., dissenting.*) *Id.*
7. **IDEM**—The statement and indorsement as entered in the judgment book was evidently intended as a determination of the rights of the parties to the confession, and it clearly shows in intelligible language the relief granted. *Id.*
 8. **IDEM**—**CLERK'S DUTIES, MINISTERIAL.**—In proceedings under the statute authorizing a judgment by confession there is no suit, no recovery, or adjudication. The statute expressly authorizes the clerk to enter the judgment. The clerk is not invested with any judicial functions. It is his duty to enter a judgment, and he can only enter such a judgment as the parties themselves have expressly authorized by their statement. *Id.*
 9. **IDEM**—**AUTHORITY TO ENTER JUDGMENT.**—The authority to enter the judgment is derived from the statute and the statement. The words "judgment entered" must be considered in connection with the statement. The statement with the indorsement and entry of the clerk, with sufficient certainty, exhibits the parties, the subject-matter, and the result, and substantially complies with the provisions of the statute, 1 Comp. L. 1422. (*Beatty, J., dissenting.*) *Id.*
 10. **IDEM**—**EFFECT OF ENTRY OF JUDGMENT.**—The entry of the judgment, as made by the clerk, is a final determination of the rights of the parties, and would be a bar to any suit that might be brought upon the promissory note or indebtedness mentioned in the statement of confession. *Id.*
 11. **WHEN JUDGMENT WILL BE AFFIRMED.**—When there is no motion for a new trial, or bill of exceptions, and where no error is suggested by counsel for appellant, the judgment will be affirmed. *State v. Ah Hung*, 428.

JURISDICTION.

JURISDICTION—QUESTION OF, RAISED BY THE COURT.—As every court is bound to know the limits of its own jurisdiction, it is the duty of the court to decide, *in limine*, the question of jurisdiction, although the parties before the court are willing to concede jurisdiction for the purpose of obtaining an opinion upon the matters in controversy. *Welch v Phillips*, 187.

INQUIRY UPON CERTIORARI. (See *Certiorari*, 1.) 213.

JURISDICTION IN CASES OF CONTEMPT OF COURT. (See *Contempt*, 6.) 214.

JURISDICTION NEED NOT BE ALLEGED IN BRINGING SUIT UPON FOREIGN JUDGMENTS. (See *Judgment*, 3.) 80.

JURY.

1. **COMMON LAW JURY—POWER OF THE LEGISLATURE.**—It is competent for the legislature to point out the mode of impaneling juries, and the forms of the common law in procuring a jury can be changed and made subject to statutory regulations. *State v. McClear*, 39.
2. **JURY LAW OF 1875.**—*Held*, unconstitutional. *Id.*

3. **IDEM—MEANING OF WORDS "TRIAL BY JURY.**—The terms "jury" and "trial by jury," as used in the constitution, mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled and sworn to render a true verdict according to the law and the evidence. *Id.*
4. **IDEM—RIGHT TO CHALLENGE A JUROR FOR ACTUAL BIAS.**—It is not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias. *Id.*
5. **IDEM—RIGHT TO CHALLENGE A JUROR FOR IMPLIED BIAS.**—The right to challenge for implied bias may, to some extent, be regulated by the legislature, care being always taken to preserve inviolate the right of trial by a jury of twelve impartial men. *Id.*
6. **IDEM—PEREMPTORY CHALLENGES.**—There is a broad distinction between challenges for bias and peremptory challenges. The former challenges exist as a matter of right. The latter is by favor of the legislature only. The number of peremptory challenges has always been regulated by statute. *Id.*
7. **IDEM—OBJECT OF CHALLENGES.**—The great purpose of the right to challenge a juror for actual or implied bias is to secure to the defendant and the state a fair and impartial jury. *Id.*
8. **IDEM—COMPETENCY OF A JUROR.**—The question as to what expression of opinion or belief as to the guilt or innocence of the defendant will disqualify a juror discussed: *Held*, that the sum and substance of this whole question is, that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales, and a true verdict render according to law and evidence. *Id.*
9. **CHALLENGE TO JURORS.**—A challenge to the panel of jurors, upon the ground that one juror expressed actual bias against the prisoner, and other jurors expressed themselves in such a manner as to imply bias upon their part, and that the law permitting said jurors to be of the panel is unconstitutional, cannot be considered as an objection to the panel of jurors. *State v. Raymond*, 99.
10. **CHALLENGE FOR IMPLIED BIAS MUST STATE THE GROUND OF CHALLENGE.**—When the defendant challenges a juror for implied bias, he must specify the particular grounds upon which he bases his challenge. *Id.*
11. **QUALIFIED OPINION OR BELIEF.**—A juror who has formed and expressed an opinion that was not unqualified, is not a disqualified juror, especially when he declares that he did not entertain any deliberate or fixed opinion or belief as to the guilt or innocence of the defendant. *Id.*
12. **CHALLENGE FOR CAUSE EMBARRASSEDLY REFUSED.**—WHEN NOT PREJUDICIAL ERROR.—If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for the want of another challenge. *Id.*

13. **JURY OF ELEVEN MEN.**—A defendant indicted for a misdemeanor may be tried by a jury of eleven men, if he consents to such a jury, and his consent is not a waiver of a jury trial. *State v. Borowsky*, 119.
14. **JURY LAW OF 1875.**—*Held*, unconstitutional. *State v. Johnson*, 148.
15. **CHALLENGE TO JUROR—MAIN QUESTION INVOLVED IN THE CASE.**—Where a juror stated that he had formed and expressed an unqualified opinion as to the course and direction of one of the mining lodes in controversy in the suit, and it was claimed that the direction of the lode was one of the main questions at issue: *Held*, that as it was impossible for the court to determine from the pleadings or facts before it, whether this was one of the main questions involved, it was the duty of the appellant to have at least offered to prove, by some competent evidence, that it was one of the main questions involved in the case. *Weill v. Lucerne M. Co.*, 200.
16. **IDEM.**—*Held*, that upon the facts of this case, it is not shown that the juror challenged had either formed or expressed any unqualified opinion prejudicial to appellant. *Id.*
17. **ALLOWANCE OF CHALLENGE TO JURORS, NOT SUBJECT TO REVIEW.**—Where the prosecution challenges a juror for implied bias in entertaining such conscientious opinions as would preclude his finding defendant guilty of murder in the first degree, and the court allows the challenge: *Held*, that under the provisions of section 421 of the criminal practice act, (1 Comp. L. 2046) the allowing of challenges by the court for implied bias is not subject to review. *State v. Larkin*, 314.
18. **COURT AUTHORIZED TO DISCHARGE JUROR.**—The court may, without a challenge from either party, upon good cause shown, discharge a juror at any time before he is sworn. *Id.*
19. **IDEM.**—The sworn statement of a juror is *prima facie* sufficient to authorize the court to act. *Id.*
20. **IDEM.**—Before the defendant can ask for a reversal upon this ground, he must show that he has in some manner been prejudiced by the action of the court. *Id.*
21. **IDEM—IMPARTIAL JURY.**—So long as an impartial jury is obtained neither party has the right to complain of the action of the court in discharging a juror not challenged by either party. *Id.*
22. **POWER OF COURT TO DISCHARGE A JURY BEFORE VERDICT.**—The power of the court to discharge a jury without the consent of the defendant, is not an absolute power, but must be exercised in accordance with established legal rules and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case. *Ex parte Maxwell*, 429.
23. **IDEM—ADJUDICATION OF RECORD.**—The facts and circumstances which induce the discharge of the jury, and an adjudication thereon, ought to be stated and appear in the record. *Id.*
24. **IDEM.**—Where the only ground appearing was, that the foreman of the jury stated "they were unable to agree upon a verdict:" *Held*, that this was not sufficient ground to authorize the court to discharge the jury.

The fact that the jury could not agree is an essential fact, the existence of which ought to be determined by the court and established by the record. *Id.*

CHALLENGE TO GRAND JURORS. (See Grand Jurors, 1-2.) 314.

JURY FAILING TO AGREE. (See Jeopardy.) 428.

LANDS.

1. SIXTEENTH AND THIRTY-SIXTH SECTIONS, ENABLING ACT OF CONGRESS, CONSTRUED.—The seventh section of the enabling act of Congress must be construed as a grant to the State in *present*, in the nature of a float, taking effect upon specific tracts of land as soon as the same are surveyed by the United States, and not before. *Layton v. Farrell*, 451.

2. *IDEM*—PRE-EMPTIONERS.—If bona fide settlements were made upon the sixteenth and thirty-sixth sections by pre-emptioners prior to the survey of the lands, then the title would not pass to the State, because they were otherwise disposed of, but other lands equivalent thereto were granted to the State in lieu thereof. *Id.*

PARTITION OF LANDS HOW MADE. (See Partition, 1-5.) 389.

ACTUAL POSSESSION OF LAND. (See Possession, 1-5.) 171.

NATURAL BOUNDARIES OF LAND. (See Possession, 4-6.) 171.

LEASE.

LEASE—WHEN IT NEED NOT BE IN WRITING.—A lease for a year need not be in writing, and the power to execute it need not be in writing. (1 C. L. 283.) *Gilson v. Boston*, 413.

LESSEE UNDER A DEMISE MADE SUBSEQUENT TO A MORTGAGE. (See Redemption, 1.) 413.

LEGISLATURE.

1. REASON AND POLICY OF THE LAW.—The reason, expediency and policy of the law is determined by its passage in the legislature and approval by the governor. These questions furnish no ground for declaring the law invalid. *State v. McClear*, 39.

2. WISDOM, POLICY, AND EXPEDIENCY OF THE LAW.—The legislative and executive departments of the State government are the sole judges of the wisdom, policy, justice or expediency of a law. *Dayton G. & S. M. Co.*, 394.

3. *IDEM*—POWER OF COURTS.—It is only in cases where the federal or state constitution limits the legislative power, and controls the will of the legislature by a paramount law, that courts are authorized to interfere and declare any legislative enactment void. *Id.*

CONTESTED ELECTIONS, COSTS HOW PAID. (See Elections, 4.) 382.

DECISION OF LEGISLATURE IN CONSTRUING LAWS NOT FINAL (See Eminent Domain, 2.) 394.

COMMON LAW JURY—POWER OF THE LEGISLATURE TO CHANGE FORMS. (See Jury, 1.) 39.

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ACT FUNDING INDEBTEDNESS OF LINCOLN COUNTY CONSTRUED. (See Statutes, 3-7.) 109.

MALICE.

DEFINITION OF. (See Charge, 1-3.) 98.

MANDAMUS.

1. **BENEFICIAL INTEREST OF RELATOR.**—When the question is one of public rights, and the object of the writ of mandamus is to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; he is interested, as a citizen, in having the laws executed and the right enforced. *State ex rel. Piper v. Gracey et al.* 223.
2. **IDEM.**—A private citizen and a taxpayer has such a direct and special interest in the collection of county taxes as entitles him to move for and prosecute the writ of mandamus to enforce that duty upon the part of public officers. *Id.*
3. **MANDAMUS A CIVIL REMEDY.**—The proceeding by mandamus is a civil remedy, having all the qualities and attributes of a civil action, and is applied solely for the protection of civil rights. *Id.*
4. **IDEM—PLEADINGS.**—The alternative writ and the return thereto are usually regarded as constituting the pleadings in proceedings by mandamus, the writ standing in the place of the complaint, and the return taking the place of the plea or answer in an ordinary action at law. *Id.*
5. **IDEM.**—The rule as declared in *Curtis v. McCullough* (3 Nev. 202), that "it is the affidavit and not the writ, which under our practice is answered," referred to in connection with the rule above stated. *Id.*
6. **IDEM—WHAT FACTS MUST BE SHOWN.**—To justify the issuance of the writ of mandamus, to enforce the performance of an act by a public officer the act must be one, the performance of which the law specially enjoins as a duty resulting from his office, and an actual omission upon the part of the officer to perform. *Id.*
7. **IDEM.**—The relator must show, not only that the officer has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application. *Id.*
8. **IDEM.**—The court cannot anticipate that a public officer will not perform his duties within the time prescribed by the statute, and an actual default or omission of duty is just as essential a pre-requisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of law. *Id.*

MANSLAUGHTER.

MANSLAUGHTER.—The instruction in the court's charge that: "If the jury believe that the defendant did, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, assault the man Mooney, and while so engaged did kill the man Twiggs, you will find the defendant guilty of manslaughter:" *Held*, correct. *State v. Raymond*, 98.

MECHANICS' LIEN.

1. **MECHANICS' LIEN—DESCRIPTION OF PREMISES.**—Where the complaint described the property as a large building on certain lots in a certain block belonging to the defendant, together with a convenient space of land around the same: *Held*, that the description was sufficiently specific. *Dickson v. Corbett*, 277.
2. **FORECLOSURE OF MECHANICS' LIEN.**—SECTION 345 OF PRACTICE ACT CONSTRUED.—In construing section 345 (1 Comp. L., 1406): *Held*, that there is nothing in the section that requires an undertaking, in an action to foreclose a mechanics' lien, to secure the money part of the judgment in order to stay the order directing the sale of the property. *Arrington v. Willenberg*, 285.
3. **IDEM.**—The only provision for a covenant in the undertaking to pay any deficiency arising upon the sale applies solely to cases in which the judgment is for the sale of mortgaged premises. *Id.*
4. **MECHANICS' LIENS—REPEAL OF OLD LAW AND PASSAGE OF NEW ACT.**—Where a law relating to mechanics' liens is repealed by a new law containing all the essential parts of the law repealed: *Held*, that the repeal of the old law does not destroy existing rights thereunder. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 220, affirmed.) *Capron v. Stroul*, 304.
5. **IDEM—FOREMAN OF MINE ENTITLED TO LIEN.**—Where a foreman of a mine is employed to "boss" the men at work in a mine, keep their time and give them orders for their pay: *Held*, that his employment is of that kind that is protected by the lien law. *Id.*
6. **APPROPRIATION OF PAYMENTS.**—Where the foreman of the mine also boarded men for the mine-owner, and at different times received money not exceeding amount due for board, no application being made by either party at the time of payment: *Held*, that the foreman at the time of filing his lien for work had the right to appropriate the money to the board account. *Id.*
7. **IDEM—MORTGAGEE NO RIGHT TO OBJECT.**—*Held*, that the mine-owner and the foreman had the right to make the appropriation without consulting Capron who held a mortgage on the mine, and that the mortgagee could not object to the manner of appropriation. *Id.*
8. **MECHANICS' LIEN, WHEN MUST BE FILED—DIFFERENT CONTRACTS.**—When the work is continuous, although done under different contracts, the lien is preserved by giving notice within sixty days after the work is completed. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 220, affirmed.) *Id.*

RIGHTS OF MORTGAGEE—NOTICE OF LIEN HOLDER. (See Contract, 2.) 304.
FORECLOSURE OF MECHANICS' LIENS. (See Pleadings, 3.) 268.

MINING CLAIMS.

NOTICE OF MINING LOCATION CONSTRUED.—Where a notice reads that the locators have taken and claim "for mining purposes 1200 feet of ground on the face of this hill, * * * running north 1200 feet from stake, with all its dips, angles and spurs, from thence to the centre of the hill:" *Held*, that the words "with all its dips, angles and spurs" refer to a lode, not to surface or hill claims. *Weill v. Lucerne M. Co.*, 200.

SECOND LOCATION OF MINING GROUND WHEN NOT AN ABANDONMENT OF THE FIRST. (See Abandonment, 1.) 201.

DEED OF MINING GROUND, DESIGNATION OF THE NAME OF THE CLAIM. (See Deed, 1, 2.) 201.

FOREMAN OF A MINE IS ENTITLED TO A MECHANICS' LIEN. (See Mechanics' Lien, 5.) 304.

MINING AND MILLING ACT, APPROVED MARCH 1, 1875, IS CONSTITUTIONAL. (See Statute, 9.) 394.

PROCEEDS OF MINES—MANDAMUS TO COMPEL COLLECTION OF TAXES. (See Taxes, 5, 6.) 223.

MINUTES OF THE TRIAL.

REPORTERS' NOTES—MINUTES OF THE TRIAL.—The legislature in using the words "minutes of the trial," in section 450 of the Criminal Practice Act (1 Comp. L. 2075), meant only the minutes as kept by the clerk, and recorded in the minute book containing the proceedings of the trial, that are daily read by the clerk and approved by the court. *State v. Larkin*, 314.

MISDEMEANOR.

(See Office and Officer.) 119.

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MORTGAGEE NO RIGHT TO OBJECT TO APPROPRIATION OF PAYMENTS MADE BY MINE-OWNER TO HOLDER OF MECHANICS' LIEN. (See Mechanics' Lien, 7.) 304.

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MOTION IN ARREST OF JUDGMENT. (See Criminal Law, 2, 3.) 416.

MUNICIPAL CORPORATION.

1. MUNICIPAL CORPORATION.—A municipal corporation, in this state, is but the creature of the legislature, and derives its powers, rights and franchises from legislative enactment or statutory implication. *State ex rel. Rosenstock v. Swift*, 129.

2. **OFFICERS OF MUNICIPAL CORPORATION.**—The officers of a municipal corporation are created by the legislature, and are chosen or appointed in the mode prescribed by the law of its creation. *Id.*
3. **IDEM—CITY RECORDER.**—The provision of the act creating the office of city recorder has no reference to the jurisdiction of justices of the peace. The offices are distinct, though under the act of incorporation both offices may be held by the same person. *Id.*
4. **MUNICIPAL CORPORATION CREATED BY SPECIAL LAW.**—Section one of article eight of the constitution clearly recognizes the authority of the legislature to create municipal corporations by special enactment. This interpretation is not inconsistent with the provisions of section eight of the same article. *City of Virginia v. The Chollar-Potosi G. & S. M. Co.* (2 Nev. 86), affirmed. *Id.*
5. **POWERS OF A MUNICIPAL CORPORATION.**—A municipal corporation possesses and can exercise such powers only as are expressly conferred by the law of its creation, or such as are necessary to the exercise of its corporate powers, the performance of its corporate duties and the accomplishment of the purposes for which it was created. *Id.*

MURDER.

See HOMICIDE.

NEW TRIAL.

- EFFECT OF ORDER PREMATURELY MADE.**—The effect of the reversal of an order granting a motion for new trial, when the reversal results from the fact that the decision was prematurely made, is to leave the motion still pending in the court below to be regularly and properly disposed of. *Thomas v. Sullivan*, 280.
- OBJECTIONS TO BOOKS OF ACCOUNT—WHEN NEW TRIAL SHOULD BE GRANTED.** (See Books of Account, 1.) 249.
- CONFLICT OF EVIDENCE.** (See Evidence, 1, 2.) 96.
- PRESUMPTIONS IN FAVOR OF THE RULINGS OF THE COURT.** (See Evidence, 8.) 343.
- EXTENDING TIME TO FILE STATEMENT.** (See Statement, 1.) 76.
- STATEMENT ON MOTION FOR NEW TRIAL CANNOT BE CERTIFIED AFTER APPEAL IS TAKEN.** (See Statement, 2.) 280.
- WHEN OBJECTIONS TO STATEMENT MUST BE MADE IN THE COURT BELOW.** (See Statement, 3.) 377.

NOTICE.

- ACTUAL NOTICE—PURCHASER IN GOOD FAITH.**—Actual notice dispenses with constructive notice. A purchaser with actual notice is not a purchaser in good faith of the estate previously conveyed. *Gilson v. Boston*, 413.

OBJECTIONS.

- OBJECTIONS, WHEN WAIVED.**—All objections to the competency of the book as testimony, except the one stated, were waived, and there was a vir-

tual admission that any appearances in the book itself, affecting its competency, were susceptible of explanation. *Jones, Adm. of Estate of Jessup v. Gammons*, 249.

OBJECTIONS TO BOOKS OF ACCOUNT. (See Books of Account, 1.) 249.

OBJECTIONS TO STATEMENT ON MOTION FOR NEW TRIAL WHEN MUST BE MADE IN THE COURT BELOW. (See Statement, 3.) 377.

OFFICE AND OFFICERS.

1. **MISDEMEANOR IN OFFICE—PUBLIC ADMINISTRATOR.**—Every willful violation of his duty by a public administrator is a misdemeanor, punishable by a fine of not exceeding \$2000 and removal from office. *State v. Borowsky*, 119.

2. **IDEM—EXPIRATION OF TERM OF OFFICE.**—It is a "misdemeanor in office" for a public administrator to embezzle money received *ex officio* after his term of office has expired. *Id.*

3. **IDEM—DUTY OF PUBLIC OFFICERS.**—It is the official duty of every public officer at or after the expiration of his term of office, to pay over to his successor, or other proper recipient, all funds received and held by him in his official capacity, and a refusal to do so, on proper demand, is a violation of his official duty. *Id.*

COUNTY OFFICERS EX OFFICIO CITY OFFICERS. (See Constitution, 4.) 128.

OFFICERS OF A MUNICIPAL CORPORATION, HOW APPOINTED. (See Municipal Corporation, 2, 3.) 129.

WHEN AN OFFICER MAY ASSAIL A TRANSACTION FOR FRAUD. (See Pleadings, 2.) 268.

PARTITION.

1. **PARTITION OF LANDS HOW MADE.**—The district court can order a partition to be made, but it cannot itself make the partition except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. *Dondero v. Van Sickle*, 389.

2. **IDEM**—When the court decides in favor of a partition being made, it should appoint referees and direct them to divide and mark out the land, including the improvements into parcels of equal value, instead of making the division into parcels of equal area. *Id.*

3. **IDEM—SEVERANCE OF IMPROVEMENTS.**—A severance and removal of improvements, which are a part of the realty, from one parcel of the land to another in order to equalize their values, is not authorized by the statute, and would generally be injurious to the interests of the tenants. *Id.*

4. **IDEM.**—If the land cannot be divided into parcels of convenient shape and situation without throwing the valuable improvements into one tract, then, unless the value of the land in the other tract is greater than the one on which the improvements are situated, it should be increased in area until it is equal, quantity and quality considered, to the remaining tract, with the improvements included. *Id.*

5. *IDEM*—PERSONAL PROPERTY.—A decree ordering a partition of certain personal property, not mentioned in the pleadings is clearly erroneous. *Id.*

PAYMENTS.

APPROPRIATIONS OF PAYMENTS, HOW MADE. (See Mechanics Lien, 6.) 304.

PLEADINGS.

1. PLEADINGS ALLEGING FRAUD.—Where personal property is found in the possession of the execution debtor, and, after levy, is claimed by a stranger, the officer is not bound to surmise that there may have been a sale, and so attack it for fraud in his answer. *Chamberlain v. Stern*, 268.
2. *IDEM*.—The officer is not bound to assail the transaction till it is brought to his knowledge, and if it makes its first appearance at the trial, he may meet it there with proof of the fraud. *Id.*
3. FORECLOSURE OF MECHANICS' LIEN—PLEADINGS.—Where the complaint states a case for relief, alleging that the work was done and the materials furnished at the special instance and request of one J. J. Bennett, the agent of the defendant, and where none of the allegations in the complaint were denied: *Held*, that a plea that "plaintiffs ought not to be allowed to maintain this action, for that on the — day of May, 1875, they obtained a judgment for the same debt against J. J. Bennett," constitutes no defense to the action. *Dickson v. Corbett*, 277.
4. *IDEM*.—The fact that plaintiffs recovered a judgment against Bennett only proves that Bennett made himself also personally liable on the contract which he entered into on behalf of his principal. *Id.*
5. AGENCY, WHEN MUST BE DENIED.—The argument of appellant is, that Bennett was not his agent, but his tenant, and had no authority to bind him or his estate: *Held*, that if this was true, appellant should have alleged the facts in his answer. *Id.*

DEFENSE TO A PROMISSORY NOTE. (See Bills and Notes, 1.) 69.

FOREIGN JUDGMENTS, JURISDICTION NEED NOT BE ALLEGED. (See Judgment, 3, 4.) 80.

PLEADINGS IN MANDAMUS. (See Mandamus, 4.) 223.

POSSESSION.

1. ACTUAL POSSESSION OF LAND.—A perfect inclosure of timber land is not necessary. If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession that is required. *Eureka M. & S. Co. v. Way*, 171.
2. *IDEM*.—The acts necessary to constitute possession, must in a great measure depend upon the character of the land, the locality, and the object for which it is taken up. *Id.*
3. *IDEM*.—Where the plaintiff relies solely upon possession there must be an actual and continuous occupation of the land, within such boundaries, a subjection of the land to the will and control of the claimant. *Id.*

4. *IDEM*.—NATURAL BOUNDARIES.—Bluffs of rock, and summits of a mountain, may be so steep and rugged as to constitute a natural boundary of land. The question as to what constitutes natural boundaries discussed in the opinion. *Id.*
5. *IDEM*.—The facts of this case discussed, and the acts of possession by appellant held insufficient to maintain the action. (*Beatty, J., dissenting.*) *Id.*
6. *IDEM*.—Natural boundaries, when taken in connection with artificial, are sufficient to make the boundaries of timber land; but the artificial boundaries must be made in such a manner as to clearly mark and define the lines, and must connect with the natural boundaries in such a manner that any person going upon the land could, by following the marked lines, tell the precise extent of the land located and claimed, and the claimant must be an actual occupant within such boundaries. *Id.*

POSSESSION OF PERSONAL PROPERTY. (See Sale, 2, 3, 5.) 268-377.

PRACTICE.

CONTESTED ELECTION CASES. (See Election.) 382.

AMENDMENT OF RECORD AFTER ADJOURNMENT OF TERM. (See Amendments.) 76.

WHEN APPEAL WILL BE DISMISSED. (See Appeal, 2.) 184.

SETTLEMENT OF BILL OF EXCEPTIONS ON MOTION FOR NEW TRIAL. (See Bill of Exceptions, 2.) 17.

PRACTICE IN CASES OF MANDAMUS. (See Mandamus.) 223.

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PRESUMPTIONS.

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PROBATE ACT.

SECTION 150 OF THE PROBATE ACT CONSTRUED. (See Statute 10.) 442.

PUBLIC ADMINISTRATOR.

(See Office and Officer, 119.)

PURCHASER.

PURCHASER IN GOOD FAITH. (See Notice, 1.) 413.

RAILROADS.

1. CORPORATION LIABLE FOR THE WANTON ACTS OF ITS AGENTS.—A railroad corporation is liable for the willful, wanton and malicious acts of its agents, while acting in the course of its business and of their employment, although the act was not directly or impliedly authorized nor ratified by the corporation. *Quigley v. Central Pacific R. R. Co.*, 350.
2. IDEM—EXEMPLARY DAMAGES.—The question of exemplary damages discussed in the opinion: *Held*, that under the facts of this case the jury were not warranted in assessing damages as a punishment of defendant independent of the question of full compensation. *Id.*
3. EJECTION FROM RAILROAD CAR, WHEN UNLAWFUL.—It is the duty of the agents of a railroad company to ascertain whether a passenger has purchased a ticket before ejecting him from the cars; their negligence in this respect cannot be pleaded or urged as a defense, nor considered in mitigation of damages. *Id.*
4. IDEM.—If it afterwards turns out that the passenger had a ticket, then no matter how much the agent was mistaken, nor how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong, and for any injury which the passenger received on account of such expulsion he is entitled to full compensation in damages. *Id.*
5. IDEM—AGGRAVATION OF DAMAGES.—If the agent uses more force than is necessary to eject a passenger, or uses vile epithets toward him, such conduct should always be considered by the jury in aggravation of damages. *Id.*
6. IDEM—MEASURE OF DAMAGES.—Where the agent in ejecting a passenger uses no more force than is necessary for that purpose: *Held*, that the passenger is entitled to receive such damages as will fully compensate him for the actual injury inflicted, whether it be to his body or his mind, to his business or loss of time, as well as his actual expenses necessarily incurred in consequence of the unlawful or wrongful act. *Id.*
7. IDEM—EXCESSIVE DAMAGES.—Where plaintiff purchased a ticket at Elko for San Francisco, and was ejected from the cars within half a mile from the town of Elko, without sustaining any bodily injuries, the conductor using no more force than was necessary to eject him; was delayed one day, and had to buy another ticket at an expense of \$40.50: *Held*, that a verdict of \$5000 was so excessive as to indicate passion and prejudice upon the part of the jury. *Id.*

RAPE.

1. **ATTEMPT TO COMMIT RAPE—CONSENT OF FEMALE.**—An attempt to commit rape does not constitute an assault when the female actually consents to what is done, whether she be within the age of twelve years or not. *State v. Pickett*, 255.
2. **IDEM.**—An assault is a necessary ingredient of every rape or attempted rape, but is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years with or without her consent, which under the statute of this state is also called rape. *Id.*
3. **IDEM.**—An assault implies force and resistance, the crime of "carnally knowing a child," etc., may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female. *Id.*
4. **IDEM.**—There can be no assault upon a consenting female, although there may be what the statute designates rape. *Id.*
5. **IDEM.**—By virtue of the provisions of the statutes of this State (Comp. Laws, sections 2464 and 2057), the defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did, but it was error to instruct the jury that he could, under such circumstances, be convicted of "assault with intent to commit rape." *Id.*

REASONABLE DOUBT.

(See Charge, 4.) 98; (See Instructions, 7.) 343.

REDEMPTIONER.

1. **RIGHTS OF REDEMPTIONER—LESSEE.**—Plaintiff purchased from B. the right of redemption to certain land, and redeemed the same from the purchaser at a foreclosure sale: *Held*, that she is not entitled to the possession of the land against a lessee under a demise made subsequent to the mortgage. *Gilson v. Boston*, 413.
2. **IDEM.**—After redeeming, plaintiff had the same estate in the land that B. had before the sale, and was as much bound by the lease as B. would have been. *Id.*

REMARKS.

REMARKS OF THE COURT NOT EXCEPTED TO. (See Charge, 5.) 149.

REMARKS OF THE COURT IN CRIMINAL CASES. (See Criminal Law, 15.) 315.
(Instructions, 1.) 30.

REMOVAL OF CAUSES.

1. **REMOVAL OF CAUSE TO FEDERAL COURT—ACT OF CONGRESS OF MARCH 25, 1867, CONSTRUED.**—Under the provisions of the act of congress "approved March 2, 1867," the existence of local prejudice need not be shown. The act only requires the person making the affidavit to state the fact; no reasons therefor need be assigned, as the question whether such bias or prejudice exists is not left to the judicial determination of the court. *Quigley v. Central Pacific R. R. Co.*, 350.

2. **IDEM—FOREIGN CORPORATION.**—A corporation is a citizen of the state where it is created, and it can be a "citizen of another state," within the meaning of the words as used in the act. *Id.*
3. **IDEM.**—An affidavit made by the vice-president of a corporation "that he has reason to believe, and does believe, that from prejudice and local influence, said defendant corporation will not be able to obtain justice in said court," is insufficient to authorize the state court to transfer the cause to the federal court. *Id.*
4. **IDEM—AFFIDAVIT, BY WHOM MADE.**—The affidavit must be made by the party to the suit. It is the belief of the citizen of another state, not the belief of such citizen's agent, that deprives the state court of its jurisdiction. *Id.*
5. **IDEM—AUTHORITY OF THE CORPORATION TO MAKE THE AFFIDAVIT.**—The question as to the power of a corporation to make the affidavit, discussed: *Held*, the affidavit must state that it is the belief of the defendant, and that the authority from the corporation to make the affidavit must in some manner affirmatively appear. *Id.*

REPEAL.

- REPEAL OF OLD LAW RELATING TO MECHANICS LIEN, AND PASSAGE OF NEW ACT.** (See *Mechanics' Lien*, 4.) 304.
- REPEAL OF STATUTES BY IMPLICATION ARE NOT FAVORED.** (See *Statute*, 8.) 260.

REPORTER.

- REPORTER'S NOTES MUST BE EMBODIED IN A BILL OF EXCEPTIONS.** (See *Bill of Exceptions*, 4.) 314.

RES GESTÆ.

(See *Evidence*, 12.) 416.

ROBBERY.

- OWNERSHIP OF PROPERTY.** (See *Indictment*, 6-9.) 334.

SALE.

1. **POWER TO SELL WITHOUT FORECLOSURE.**—A power to sell without foreclosure is operative when the intention to confer it is clearly expressed. *Evans v. Lee*, 194.
2. **POSSESSION OF PERSONAL PROPERTY.**—Where certain personal property was sold on the twenty-first of November, and the testimony shows a delivery at that time, and a change of possession until April 1, but after that date and before the levy of a third party, the possession was restored to the grantor, who was in actual possession at the time of the levy as bailee: *Held*, that the court erred in finding that the change of possession continued after April 1, and in finding that the defendant took the property from the grantees. *Chamberlain v. Sterns*, 268.

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3. **IDEM.**—Whether the change of possession that did take place was sufficiently open, unequivocal and continuous, to satisfy the statute of frauds, is a question of fact for the court or jury to determine. *Id.*
4. **CONSIDERATION OF SALE.**—Where the bill of sale offered in evidence recited a consideration of \$1,600, and the grantor and grantee both testified that money was paid: *Held*, that it was error to refuse to allow the defendant to ask those witnesses how much money was paid as the consideration of the alleged sale. *Id.*
5. **DELIVERY AND CHANGE OF POSSESSION OF PERSONAL PROPERTY.**—*Held*, upon the authority of *Gray v. Sullivan* (10 Nev. 416), that the evidence in this case was sufficient to sustain the finding of immediate delivery and actual and continued change of possession. *Twist v. Kelly*, 377.

POSSESSION AND DELIVERY OF PERSONAL PROPERTY. (See *Delivery*, 1, 2.) 149.

SEAL.

POWER OF SECRETARY OF CORPORATION TO AFFIX CORPORATE SEAL. (See *Corporation*, 1.) 194.

FOREIGN CORPORATIONS ACT OF MARCH 3, 1869. (See *Evidence*, 7.) 194.

SERVICE.

SERVICE OF NOTICE OF APPEAL. (See *Appeal*, 1.) 76.

STATEMENT.

1. **EXTENDING TIME TO FILE STATEMENT ON MOTION FOR NEW TRIAL.**—An order signed by the judge extending the time fixed by statute for filing a statement on motion for a new trial, must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute. *Clark v. Strouse*, 76.
2. **STATEMENT ON MOTION FOR NEW TRIAL CANNOT BE CERTIFIED TO AFTER APPEAL IS TAKEN.**—Where the court below allowed and settled a statement after action upon the motion for new trial and after an appeal was taken: *Held*, that the court had lost jurisdiction by the appeal, and that the statement on motion for new trial must be disregarded. *Thomas v. Sullivan*, 280.
3. **WHEN OBJECTIONS TO STATEMENT ON MOTION FOR NEW TRIAL MUST BE MADE IN THE COURT BELOW.**—Where an objection is made to the consideration of an appeal from an order overruling a motion for new trial upon the ground that it does not appear from the transcript that the statement on motion for new trial was filed in time: *Held*, that this court will not notice such an objection unless the transcript shows that it was made in the district court. *Twist v. Kelly*, 377.

SETTLEMENT OF BILL OF EXCEPTIONS ON MOTION FOR NEW TRIAL. (See *Bill of Exceptions*, 2.) 17.

STATUTE.

1. **EFFECT OF DECLARING THE LAW VOID.**—*Held*, that the effect of declaring certain parts of the amended law of 1875 unconstitutional and void, is to leave in full force the sections of the law of 1861 which the act of 1875 attempted to amend and repeal. *State v. McClear*, 39.
2. **ADOPTION OF ENGLISH STATUTES.**—English statutes in force at the date of the declaration of American independence and applicable to our situation are a part of the common law which we have adopted (affirming *Ex parte Blanchard*, 9 Nev. 105.) *Evans v. Cook*, 69.
3. **STATUTE, WHEN DIRECTORY.**—A statute prescribed merely as a matter of form, containing directions which are not of the essence of the thing to be done, but which are given solely with a view to the orderly and prompt conduct of the business is merely directory. *Odd Fellows' Sav. & Com. Bank v. Quillen*, 109.
4. **ACT APPROVED FEBRUARY 17, 1873 (Stats. 1873, 54), CONSTITUTIONAL.**—The constitutionality of the act funding the indebtedness of Lincoln county sustained on the authority of *Youngs v. Hall* (9 Nev. 212). *Id.*
5. **CONSTRUCTION OF STATUTES.**—It is the duty of courts, in construing a statute, to ascertain what the legislature had in view in adopting it, in order to secure, if possible, the object intended to be secured by the statute. *Id.*
6. **ACT FUNDING THE INDEBTEDNESS OF LINCOLN COUNTY CONSTRUED.**—In construing the act of 1873 (Stats. 1873, 54): *Held*, that the legislature intended to, and did, make provision for the payment of the interest on the bonds, regardless of the question whether the financial transactions of the county could be kept on a cash basis or not. *Id.*
7. **CONSTRUCTION OF STATUTES.**—When the various sections of the statute are clear, plain, and unambiguous, the legislature must be understood to mean just what it has explicitly expressed. In such a case there is no room for construction. *Id.*
8. **REPEAL OF STATUTES BY IMPLICATION—HOMESTEAD ACT OF 1865.**—Repeals by implication are not favored, and are only held to have occurred in cases of irreconcilable repugnancy between the latter and former enactments, where the two cannot stand together, and there is no such repugnancy between the probate act and the homestead act. *Estate of Walley*, 260.
9. **MINING AND MILLING ACT, CONSTITUTIONAL.**—The act entitled, "An act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada," approved March 1, 1875 (Stat. 1875, 111), is constitutional. *Dayton G. & S. M. Co. v. Seawell*, 394.
10. **SECTION 150 OF THE PROBATE ACT CONSTRUED.**—The probate act regulates the proceedings of executors and administrators as such, and acting in that capacity alone, the validity of their acts depends upon a compliance with its provisions; but the act has no application to a case like the present, where the executrix is the owner of the residuary estate. *Hunt v. Hunt*, 442.

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TAXES.

1. WHEN INJUNCTION WILL NOT ISSUE TO RESTRAIN COLLECTION OF TAXES.—No court of equity will allow its injunction to issue to restrain the collection of a tax, except when actually necessary to protect the rights of citizens who have no plain, speedy and adequate remedy at law. *Wells, Fargo & Co. v. Dayton*, 161.
2. IDEM.—Before an injunction will be granted, it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, if the property is real estate, throw a cloud upon the title of complainant, or there must be some allegation of fraud. *Id.*
3. IDEM—INSOLVENCY OF ASSESSOR.—The mere allegation of the insolvency of the assessor is not sufficient to authorize the court to grant an injunction to restrain the collection of a tax. *Id.*
4. IDEM—PAYMENT OF TAX—REMEDY AT LAW.—*Held*, that the complainant in this case had an adequate remedy at law. If the taxes are paid under protest, and the county received the money, it could have brought its action against the county, and if the tax was illegal, could have recovered the money back. *Id.*
5. MANDAMUS—COLLECTION OF TAXES—PROCEEDS OF MINES.—The collection of taxes solely due to a county is a question of public concern as well as of private interest, the collection of such taxes involve public duties and public rights. *State ex rel. Piper v. Gracey et al.*, 223.
6. COUNTY COMMISSIONERS HAVE NO POWER TO RELEASE PROPERTY FROM TAXATION.—County Commissioners have no power to discriminate as to the character of the property which should be subject to taxation. That is a question for the legislature, subject to the provisions of the constitution. *Id.*
7. PENALTY FOR NON-PAYMENT OF TAXES.—In construing the act approved March 7, 1873 (Stat. 1873, 169): *Held*, that the penalty of twenty-five per centum follows the tax, that five thirteenths of the penalty belongs to the State, and eight-thirteenths to the county. *State ex rel. Hobart v. Huffaker*, 300.

TERM.

AMENDMENT OF RECORDS AFTER ADJOURNMENT OF TERM. (See Amendments, 1.) 76.

SETTING CAUSES FOR TRIAL DURING THE TERM IS WITHIN THE DISCRETION OF THE COURT. (See Habeas Corpus, 1.) 90.

TRANSFER.

See REMOVAL OF CAUSES.

VERDICT.

VERDICT CONTRARY TO EVIDENCE. (See Criminal Law, 1.) 17; (See Evidence, 2.) 98.

POWER OF COURT TO DISCHARGE A JURY BEFORE VERDICT. (See Jury, 23.) 429.

WILLS.

1. CONSTRUCTION OF WILLS.—The testator, by his will, disposed of his property to his wife, "having the fullest confidence in her capacity, judgment, discretion and affection, to properly bring up, educate and provide for our children, and to manage and dispose of my said property in the best manner for their interests and her own:" *Held*, that the devisee took the property devised as absolute owner, and not upon trust. *Hunt v. Hunt*, 442.

2. *Idem*.—In construing this will, the court held that the widow had the absolute right to sell and dispose of the estate at her discretion. *Id*.

WITNESS.

1. CREDIBILITY OF WITNESS.—WANT OF CHASTITY.—Defendant asked the court to give this instruction: "The jury may, and it is their duty, to take into consideration the chastity or want of chastity of any witness for the state, in determining the credibility of such witness:" *Held*, that it was calculated to mislead the jury, and was properly refused. *State v. Larkin*, 315.

2. *Idem*.—The general rule is that evidence of bad character for chastity, where such character is collaterally, not directly, in issue, is not admissible for the purpose of impeaching the credibility of a witness. *Id*.

3. *Idem*.—Want of chastity might, in some instances, include a want of veracity, but this is not always the case. In impeaching the character of a witness the inquiry in chief should be restricted to his general reputation for truth and veracity. *Id*.

CROSS-EXAMINATION OF A DEFENDANT IN A CRIMINAL CASE. (See Criminal Law, 2, 3.) 17.

CROSS-EXAMINATION OF A WITNESS. (See Criminal Law, 13, 14.) 315.

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